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Vol. VIII NOVEMBER, 1945 No. 4

PROBLEMS OF THE RATE OF EXCHANGE

1. The rate of exchange, expressing the price of the unit of account of one currency in terms of another currency, is an institution which lawyers frequently come across, but with the mechanism of which they are not always familiar. In times of a freely functioning foreign exchange market no harm results from any such lack of knowledge of economics and banking practice, because the differences between various types of rates are so small that lawyers are in fact not required to trouble *de minimis* or to abandon the widely existing illusion that it is possible by reference to a newspaper to ascertain a rate of exchange which may be regarded as official. But in periods of instability of currencies, of exchange management and exchange control it becomes essential even for a lawyer to have an idea of the structure of the foreign exchange market, if he is concerned with problems of the rate of exchange, and it therefore appears convenient to preface the following discussion by a few observations on some elementary aspects of the foreign exchange market.[1] In this connexion it is proposed to disregard war-time developments which, owing to the Treasury's control over buying and selling foreign exchange,[2] have led to the disappearance of the London market as it used to be known; even if it should not be

[1] A description will be found in any textbook on banking or foreign exchange, however primitive. The following remarks are based on S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (6th Edition, London, 1936); H. E. Evitt, *A Manual of Foreign Exchange* (London, 1936); W. F. Spalding, *Foreign Exchange and Foreign Bills* (11th edition, London, 1938); see also *Thomson's Dictionary of Banking* (1939) *sub verbo* Foreign Exchange.

[2] Defence (Finance) Regulations, 1939, as amended, Reg. 2.

fully restored,[3] from a legal point of view its fundamentals will for many years retain more than a merely historical interest.

The London Foreign Exchange Market, an unofficial and informal organisation consisting of independent brokers and dealers, i.e. the operators in the foreign exchange departments of financial houses, knows four principal types of rate of exchange:

(*a*) The T.T. (telegraphic transfer) or spot[4] rate indicates the price of payments or transfers effected by cable or telegraph. This method of payment involves no risk of loss, no loss of interest and no stamp duties. Hence the T.T. rate "may be regarded as the truest reflection of the relative value of the two currencies at any particular moment," as "the basic rate of foreign exchange between any two currencies."[5] The rate charged by a bank to purchasers of cable and telegraphic transfers are dearer than for any other form of remittance, since there is no period of transmission during which the bank could earn interest.

(*b*) The M.T. (mail transfer) rate is quoted for a payment which the bank instructs its agent to make by letter. It is usually cheaper than the spot rate, since during the period from the dispatch to the receipt of the letter the bank earns interest on the money paid by its customer.

(*c*) The rate for sight drafts (or cheques) is normally identical with the M.T. rate, since the bank which draws on its agent and hands the document to its customer for transmission has the use of the money during the period of transit.

(*d*) The rate for coins and notes is based on the T.T. rate, but is influenced by loss of interest and the cost of packing, postage and insurance. It is ascertained by the Foreign Money Departments of the big banks and certain other specialists. The amounts involved are usually small and largely depend on the incidents of tourist traffic.

There are certain other rates (such as short, long, tel quel rates and so forth) the intricacies of which are of no interest to the following discussion, but in the years preceding the outbreak of war the market had to give an increasing amount of attention to the rates for "blocked credits" which arose in a great number of foreign countries owing to the introduction of exchange restrictions.[6] These blocked balances could be sold at a discount the extent of which depended on their

[3] The Proposals for an International Clearing Union, commonly known as the Keynes Plan (Cmd. 6437) seemed to welcome a perpetuation of the present exchange restrictions. The effect of the more recent Proposals for an International Monetary Fund (Cmd. 6546) as suggested at Bretton Woods on exchange restrictions is by no means clear.

[4] This expression is frequently used, e.g., by Minty, *Law of Banking*, pp. 270, 271. See also Mann, *The Legal Aspect of Money* (1938), p. 49, although it was inaccurately defined there as the rate for sight drafts rather than for cable transfers. This article constitutes a thorough revision and elaboration of pp. 49–52 of the author's book published almost seven years ago.

[5] Thomas, *l.c.*, p. 117.

[6] Their general aspect is described by Mann, *l.c.* pp. 53 *sqq.*; Nussbaum, *Money in the Law* (1939), pp. 475 *sqq.*; Thomas, *l.c.*, pp. 361 *sqq.*; Evitt, *l.c.*, pp. 285 *sqq.* As to German restrictions in particular see H. S. Ellis, *Exchange Control in Central Europe* (1941).

nature and origin and on the possibilities of utilising them. At the same time the market in notes and coins of countries which, in connexion with their restrictive measures, had prohibited the export and very often also the import of their currency, became enlivened. To a considerable, though by no means exclusive,[7] extent this market was fed by currency which had been smuggled out of, and was to be smuggled back into, its home country; such currency was naturally quoted at a discount which was largely independent of the basic T.T. rate, but was determined by the laws of supply and demand expressing, in this case, the opportunities of smuggling and re-smuggling rather than a measure of valuing the foreign currency as such.

None of the rates quoted on the London market is in any way official in the sense of exclusive or conclusive. Prior to 1921 there existed a list of rates, the "London Course of Exchange," which was fixed each Tuesday and Thursday afternoon at meetings of foreign exchange brokers and dealers held in the Royal Exchange, and these rates were regarded as "official" inasmuch as they were customarily accepted as good evidence. At the outbreak of war, however, no uniform or generally acceptable or authoritative rate existed, and the methods of publication adopted by the daily papers varied considerably. Compilations are made under private arrangements between the clearing houses, but the banking house of Messrs. Samuel Montagu & Co. makes a daily record of the highest and lowest quotations during each day. This list is available to the Press and it is said that "as presented in *The Times*, for instance, it would undoubtedly be good evidence in a court of law."[8] From whatever source, however, the published rates are derived, it is clear that most quotations published nowadays are the rates quoted by London dealers for telegraphic transfers.[9] These are the rates which in the course of the 20th century, with its great expansion of technical facilities, have acquired overriding authority among traders and financiers.

2. In the eye of the law the conception of the rate of exchange has no established meaning. Certain authorities, it is true, have been empowered by Parliament to prescribe the rate which, in connexion with transactions falling within their province, forms the basis for a conversion of foreign currency into sterling,[10] and in 1882, when, owing to the state of technical evolution, it was still usual to effect payments by mail and therefore to employ what is now known as the M.T. rate, s. 72 (4) of the Bills of Exchange Act prescribed that the amount of a bill expressed in foreign currency was to be converted into sterling "according to the rate of exchange for sight drafts." But these are exceptional cases; they have no bearing upon the

[7] "The Economist" of 2nd February, 1939 (vol 134, p. 255), reported that large amounts of new Reichsmark notes were flooding the London market. They were believed to have been put into circulation by certain German authorities anxious to obtain foreign currency.

[8] Evitt, *l.c.* p. 182.

[9] Thomas, *l.c.*, pp. 81, 175; Minty, *l.c.*

[10] E.g. for the purpose of stamp and customs duties.

question what rate of exchange should be recognised as decisive in the legal sense.

In case of an undisturbed exchange market this problem has more than academic interest only when the law is concerned with a contract involving foreign money as a commodity, viz. a sale of foreign money as the object of commercial intercourse.[11] Thus a dispute between a foreign exchange broker and dealer may make it necessary to determine whether a deal was transacted on the basis of the spot or the mail transfer rate. It is in the event of wide divergencies between the various rates, such as are brought about by restricted markets, that the definition of the legally relevant rate becomes important to the numerous cases in which claims to the payment of foreign currency are to be dealt with and in which, therefore, foreign currency functions as money.

The solution furnished by the law is, it is believed, that no single type of rate is entitled to pre-eminence, that, while for purely practical reasons the spot rate will have to be applied most frequently, no presumption in its favour exists, but that in each case the appropriate rate is determined by the nature of the claim giving rise to the conversion.

3. Since, as a matter of fact, the spot rate is applied by the commercial community in the vast majority of their transactions, lawyers may safely draw the conclusion that wherever the conversion of foreign currency is contemplated as a necessary incidence[12] under the terms of a contract, the parties may be taken to have impliedly agreed upon the application of the spot rate (as opposed, chiefly, to the rate for notes or coins). The spot rate is the "reasonable" rate which applies in the absence of an express stipulation, in the same way as the law imputes an intention to pay a reasonable price, if the price is not fixed in the contract (s. 8 (2) of the Sale of Goods Act, 1893).

If a contract provides for a payment to be made "at the current rate of exchange" or "at the rate of exchange of the day" or "at the rate of exchange in London," it is a matter of construction to ascertain the rate envisaged by the parties, but in default of special circumstances it will be found to be the commercially usual and published rate, i.e. the spot rate. The result will be the same in cases where the money of account, as well as the money of payment, is fixed by the contract, but where, for the purpose of discharging the obligation, an "item" expressed in a foreign currency, requires to be converted into the money of payment.[13] A good example of this factual situation is supplied by the decision of the Court of Appeal in *Versicherungs & Transport A.G. Daugava* v. *Henderson*.[14] A London underwriter had reinsured a Latvian insurance company against their liability under a fire insurance policy on buildings in Riga. The liability of the

[11] Mann, *l.c.*, pp. 129 *sqq.*

[12] This distinguishes the present case from that mentioned in paragraph 7 below.

[13] See, generally, Mann, *l.c.*, pp. 251 *sqq.*

[14] (1934), 49 Ll. L. R. 252.

reinsurer towards the insurer was expressed in and dischargeable by the payment of sterling, but the amount, of course, depended on the sum of Latvian currency paid by the insurer to the assured in respect of the value of the buildings. The decision of the Court of Appeal related to the question whether the sum of Latvian currency was to be converted into sterling at the rate of exchange of the date of the fire or at that of the settlement of the insurer's liability, and is therefore of no interest to the problem under discussion; but the facts show a typical case where a conversion of an "item" must have been contemplated by the parties, the insurer and reinsurer, and where, failing any express agreement, the spot rate must be taken to have been impliedly agreed upon. Similar cases occur where the price payable by the buyer is fixed with reference to a quotation on a foreign market; thus, if a merchant in London buys grain from a Liverpool importer at "Buenos Aires quotation plus 10 per cent" or if he buys through his stockbroker Argentine shares on the Buenos Aires market "at 94 per cent," the buyer will normally owe, and pay, such amount of pounds sterling as corresponds to the agreed amount of pesos converted at the spot rate. To apply in such cases the rate for notes or coins would do violence to the intention of the parties. They had contracted in sterling, they were in no way concerned with the delivery of specific foreign money, they merely contemplated an exchange operation to be effected on the basis of the usual commercial rate rather than of the somewhat fortuitous and unrepresentative rate for notes and coins. For the same reason it is clear that in international exchange transactions the spot rate will almost invariably have to be applied.

4. Different considerations prevail in the case of a promise to pay a liquidated amount of foreign currency. A debt of this description may have to be converted into sterling for reasons of either substantive law or the law of procedure. A contract between two London merchants may provide for the payment of dollars; the true construction of that contract is that when the time comes for payment the amount having to be paid in this country will be paid in sterling.[15] On the other hand, if a French contract made in France between Frenchmen provides for the payment of francs in France and is enforced here, a conversion is necessary according to the rule of procedure that English Courts have no jurisdiction to order payment of money except in the currency of this country.[16]

The rate of exchange to be applied in such circumstances is the rate for whatever is legal tender under the law of the currency in which the debt is expressed; usually this will be the rate for banknotes. The reason is that according to well-established principles a promise to pay a given number of units of foreign currency is a promise to pay whatever may be legal tender at the time of payment in the country where such

[15] *Anderson* v. *Equitable Assurance Society of the United States* (1926), 134 L.T. 557, 562, per Bankes, L.J.; see Martin Wolff, *Private International Law* (1945) p. 469, note 2.

[16] *Manners* v. *Pearson*, [1898] Ch. 587, per Lord Lindley.

foreign currency circulates.[17] Since the amount of sterling into which the sum of foreign currency is to be converted should most closely correspond to the value of that which the debtor has promised to pay and which, if paid, would discharge the debt, the appropriate rate must be that for legal tender of the country concerned.

It will be readily appreciated that under a free exchange market little emphasis had to be placed upon this rule,[18] but it sprang into prominence when, in consequence of the situation described above, the notes of many foreign countries were at a substantial discount as compared to the usually grossly overvalued spot rate.[19] In such circumstances, it is submitted, the two decisive questions are as follows: Is the external note, i.e. the note which is situate outside the issuing country and the reintroduction of which is possible only with permission, good legal tender in the issuing country? Is there, in respect of such notes, a reliable market resulting in a rate of exchange? If both questions are answered in the affirmative, the rate for notes may and must be applied. Whether or not an affirmative answer is possible, is a question of fact to be decided in each case in the light of the evidence. The first question is to be decided on the strength of expert evidence as to the law of the currency; as to the second question evidence by a banking expert will usually be required. In no case will it be permissible to deduce any counter argument from the fact that the notes are likely to have been smuggled out of, and to be smuggled back into, the country of their issue or that they have less "value" than payments made by bank transfer, cheque, bill of exchange or some similar method. The latter argument is irreconcilable with the principle of nominalism; a creditor of a sum of foreign money must accept whatever is legal tender under the law of the currency; he cannot insist on a method of payment for which he has not contracted (such as a bank transfer) and his complaint about loss of "value" is not more valid in the case of payment by notes than it would be if, e.g., notes had been substituted as legal tender for gold coins current at the date of the contract. Of course, if external notes were, or could be, demonetised and if, therefore, after reintroduction into the country of their issue they were no longer legal tender, different

[17] *Re Chesterman's Trust, Mott* v. *Browning*, [1923] 2 Ch. 466, and numerous other cases.

[18] It is, however, noteworthy that as early as 1917 Professor Martin Wolff recognised the principle by pointing out that the debtor who has contracted to pay foreign currency in Germany and, exercising his option under sect. 244 of the German Civil Code, chooses to pay in German currency "at the rate of exchange prevailing at the date of payment at the place of payment," must pay according to the rates for foreign legal tender: *Ehrenberg's Handbuch IV* (1), p. 641. This view was followed by Staub-Gadow, *Kommentar zum Handelsgesetzbuch*, 14th edition (1933), p. 88, note 54, and Staudinger (-Werner), *Kommentar zum bürgerlichen Gesetzbuch, II* (1), 9th edition (1929), p. 101, but rejected without justification by Nussbaum, *Das Geld* (1925), p. 222, and Düringer-Hachenburg-Breit, *Kommentar zum Handelsgesetzbuch* (1932), IV, p. 757. The latter view is also held in regard to the similar provision of Art. 84, of the Swiss *Obligationenrecht*, by Oser-Schönenberger, *Kommentar* (1929), Art. 84, note 18.

[19] On the overvaluation of the German currency in particular see the book by Ellis, mentioned note 6.

results would follow; but where the *lex monetae* does not so provide, the legal tender quality of the note is not affected by its "value." As to the contention based on the likelihood of smuggling, it overlooks not only that the inference of smuggling and re-smuggling cannot by any means be regarded as inevitable (since the notes may have been lawfully exported), but also that smuggling has no tainting effect except if it is the contractual purpose common to both parties.[20] Such purpose would exist, if a contract between Englishmen necessarily involved the introduction of notes into the country of their issue in contravention of that country's laws;[21] but even if the creditor who receives notes did not intend to sell them on the market, but to engage directly in a smuggling transaction and if the debtor knew this, the mere payment of the notes would not be a dealing necessitating the parties joining in an illegal act.[22]

The views here expressed[23] are in conformity with a very remarkable decision of a high German court in a case relating to the payment of Reichsmark notes in Holland in discharge of a Reichsmark debt;[24] they are supported by decisions of Continental courts in cases not involving the *moneta fori*[25] and, it is believed, correspond to what may be regarded as English law.

The application of the rate for notes was rejected by Atkinson J. in *Graumann* v. *Treitel.*[26] The decision arose out of a contract which

[20] *Foster* v. *Driscoll*, [1929] 1 K.B. 470.

[21] *Marrache* v. *Ashton*, [1943] A.C. 311, 319, per Lord Macmillan.

[22] See the formula of Sankey, L.J. (as he then was) in *Foster* v. *Driscoll*, [1929] 1 K.B. 470, 521.

[23] See already Mann, *l.c.*, p. 124, note 2; also Cohn (1939), 55 L.Q.R. 552, and the replication III (1939–1940), Mod. L. R. 214, note 55. *Contra* Nussbaum, *Money in the Law* (1939), p. 501, without any supporting argument. The decision of an American Consular Court in Shanghai, October 5, 1936, *Juristische Wochenschrift* (1937), 711 is of little weight.

[24] Court of Appeal, Karlsruhe, 26th September, 1940, *Deutsches Recht II* (1941), 209. In proceedings in the Dutch Courts the plaintiff's assignor had obtained a judgment against a Dutch defendant for R.M. 1668. The judgment debtor paid the amount of the judgment into the Dutch Court in German notes and coins. The plaintiff as assignee of the Dutch judgment debt repeated his claim for payment in the German Courts on the ground that the Dutch judgment had not been satisfied. The action failed. The reasons for the decision may be summarised as follows: German currency situate outside Germany has not been demonetised. The prohibition of exportation and importation of Notes does not affect their legal tender quality. German currency may have lawfully reached foreign countries and there are lawful means of re-introducing it into Germany. The fact that extraneous notes are dealt in at a heavy discount does not deprive them of their character as German legal tender. On the other hand the Court of Appeal at Breslau seems to have held that German banknotes which have been smuggled into Germany are not even in Germany legal tender, March 10th, 1937, *Höchstrichterliche Rechtsprechung*, 1938, No. 693; in the same sense Berghold, *Juristische Wochenschrift*, 1936, 228. This view offends against the principle that money has no ear-mark.

[25] *Trib. Civ. de la Seine*, 18th July, 1938, *N.R.D.I.P.* VI. 171, and *B.I.J.I.* 1940 (42), No. 11028; *Trib. Com. de la Seine*, 16th November, 1938, *D.H.*, 1939, 63, and *Annual Digest*, 1938–1940, No. 190; also *Trib. Com. Zürich*, 10th October, 1937, *N.R.D.I.P. VI*, 288, and *B.I.J.I.* (1940–41) No. 10923, affirmed by the Swiss Federal Tribunal on 8th February, 1938 (unreported). See Rashba, 41 (1943), Mich. L.R., 1089, 1104.

[26] (1940), 2 All E.R. 188, followed in *Ginsberg* v. *Canadian Pacific Steamship, Ltd.*, 66 (1940), Ll. L.R. 20.

was made in Germany between parties then resident in Germany and which was governed by German law. Under it the defendant was indebted to the plaintiff in the sum of RM 78,000 odd. The place of performance in respect of the debt was Berlin, but the learned Judge apparently held that it shifted to London when both parties established their residence there.[27] The plaintiff claimed the sterling equivalent of RM 78,000 at the "official" rate of exchange of about RM 12 to the pound. The defendant argued that at the relevant date Reichsmark notes could be bought on the foreign exchange market in London at about RM 36 to the pound and that therefore this rate should be applied. Atkinson, J., who felt "a little puzzled" about that contention, agreed that, if the defendant had chosen to buy the appropriate number of Reichsmark notes and to pay them to the plaintiff, this would have been a good discharge.[28] Yet he applied what he described as "the official current rate of exchange" for two reasons. The first was that it had "never been suggested that, when for the purpose of judgment, one comes to convert the amount of the debt into sterling, one can take the rate at which foreign currency could or might have been bought on the foreign exchange market in London." Secondly, it was pointed out that the "official" rate did not do any injustice to the defendant, since "in arriving at the marks to be paid out by the defendant at the dissolution of the partnership between the parties the value of the English capital was turned into marks at that same rate." The latter point might have led to an implied agreement between the parties and would, therefore, not be of general validity. The former point, however, seems to rest on a misunderstanding of the true nature and function of the "official" rate and of the character of an obligation to pay a liquidated sum of foreign currency, and also on the absence of authority.

This has now been supplied by the decision of the Privy Council in *Marrache* v. *Ashton*.[29] The appellant was indebted to the respondents in the sum of 110,000 Spanish pesetas which fell due for repayment on May 25, 1939. All parties were residents of Gibraltar, the law of which governed the contract and where payment was to be made. At the date of the contract gold and silver coins were legal tender in Spain, but as from January 20, 1939, Bank of Spain peseta notes were, apart from gold, the only legal tender in Spain. Under Spanish law

[27] This part of the judgment is almost certainly due to a misunderstanding (see Kahn-Freund, IV (1940–1941) Mod. L. R. 149). Unless the learned Judge was acquainted with and intended to follow a peculiar decision of the German Supreme Court (4th December, 1923, *Juristische Wochenschrift*, 1924, 1357, No. 3), there is no doubt that under German law the place of performance (payment) was and remained in Berlin. This was apparently made quite clear in evidence by the defendant's expert witness, Professor M. Wolff, but the learned Judge seemed to prefer the evidence of the witnesses called on behalf of the plaintiff, although it is extremely difficult to follow their argument. See, however, below, paragraph 6.

[28] At p. 200, relying on *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451.

[29] [1943] A.C. 311, discussed 59 (1943), L.Q.R. 301; on the two cases discussed in the text see R. Lachs, 93 (1943), *Law Journal*, 299, 307.

it was illegal to export from or import into Spain such peseta notes. Yet there was a market for them in Gibraltar, London and elsewhere. Their rate was about 132 pesetas to the pound, the "official" rate, recognised by the Spanish authorities being 53 pesetas to the pound. The appellant admitted liability for the sterling equivalent of the peseta amount at the rate of 132 and paid it into Court after action brought. Reversing the judgment of the Gibraltar Court the Privy Council decided that this was sufficient to discharge the debt. The *ratio decidendi* was succinctly stated by Lord Macmillan[30]:

> "The only necessary reference to Spanish law was for the purpose of ascertaining what in Spain was legal tender for the payment of so many Spanish units of account. This having been ascertained the Court at Gibraltar was not concerned with the domestic currency regulations and restrictions imposed by the Spanish Government. There had been no Spanish decree demonetising Spanish peseta notes abroad. . . . All that the Court had to do was to ascertain what was legal tender in Spain for so many pesetas and then to inquire whether there was a market in Gibraltar for the sale and purchase of such Spanish currency and if so what was the market rate. Bank of Spain notes were legal tender in Spain, there was a market for such notes in Gibraltar and the rate there prevailing was 132 pesetas to the pound sterling."

This decision may be said to supersede, though it does not, *stricto sensu*, overrule, the decision in *Graumann* v. *Treitel*.[31] The facts of the two decisions, it is true, are by no means identical, but none of them affords a legally material distinction. Firstly, in *Marrache* v. *Ashton* the debtor had paid into Court the sterling equivalent of the pesetas calculated at the rate for notes, while in *Graumann* v. *Treitel* no payment had been made; but Atkinson, J. himself said [32] that if the defendant had paid to the plaintiff Reichsmark notes, the liability would have been discharged. There cannot, however, be any difference between payment to the plaintiff and payment into Court, and in any case the question of payment or no payment is irrelevant, since it should be accepted as a fundamental principle[33] that no judgment should order the defendant to pay more than he would have had to pay had he paid voluntarily. Secondly, in *Graumann* v. *Treitel* there existed an identity between the *lex monetae* and the *lex causae*, both being German; in *Marrache* v. *Ashton*, however, the contract was subject to the law of Gibraltar while the law of the currency was Spanish. But in both cases the necessity for conversion arose under rules of procedure and it was, therefore, a matter for the *lex fori* to determine the material rate of exchange; this was a problem upon which neither

[30] p. 319.
[31] (1940), 2 All E.R. 188.
[32] See note 28.
[33] Unfortunately, it has often been disregarded; see, e.g., *Vionnet & Cie* v. *Wills*, [1940] 1 K.B. 72, commented upon 56 (1940), L.Q.R. 150.

the *lex monetae* nor the *lex causae* had any bearing. Thirdly, in *Graumann* v. *Treitel* Atkinson, J. held that the claim for the sterling equivalent of RM 78,000 odd was a claim in debt, while the decision in *Marrache* v. *Ashton* proceeds from the premiss that "the appellant not having specifically performed his contracts by delivering peseta notes to the respondents became liable to them in damages for his failure to deliver to them the stipulated quantity of the commodity which he had contracted to deliver" and that, consequently, "the measure of damages for his failure is the sum in sterling which it would cost the respondents to obtain for themselves in the market the amount of the commodity which the appellant was bound but had failed to deliver to them." The problem of classification to which the promise to pay foreign currency within the jurisdiction[34] may give rise may be a doubtful one,[35] but it is of so technical a character and at the same time so futile that no importance should be attached to it. It may have had some significance under a system of forms of actions,[36] but "when these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred."[37] In fact, it is beginning to be recognised that the promise to pay a sum of foreign currency is a monetary obligation.[38] In no event can the classification of such a promise influence the determination of the type of rate of exchange on the basis of which a conversion into sterling is effected.

While, therefore, the decisions in *Graumann* v. *Treitel* and *Marrache* v. *Ashton* are irreconcilable, it is the latter decision which, it is submitted, proceeds on the correct principle and should be followed in practice.

5. If, then, it is accepted that the rate for legal tender should be applied in connexion with the conversion of liquidated sums, a complication may arise owing to the fact that the rates may not be the same at all material places. Thus in *Marrache* v. *Ashton*[39] the place of the forum and the place of payment were identical, and it may reasonably be assumed that the Madrid rate for the conversion of peseta notes into sterling was very considerably higher than the Gibraltar rate.[40]

[34] It should be remembered that according to Atkinson, J. in *Graumann* v. *Treitel, ubi supra,* the defendant owed Reichsmarks in London.

[35] See note 11 above. And see Lord Atkin in *Rhokana Corporation* v. *Inland Revenue Commissioners,* [1938] A.C. 380, 388: "In my opinion there can be no debt in this country of an amount in foreign currency."

[36] Cf. *Société des Hôtels Le Touquet* v. *Cummings,* [1922] 1 K.B. 451, 464, per Atkin, L.J. (as he then was).

[37] *United Australia Ltd.* v. *Barclays Bank Ltd.,* [1941] A.C. 1, 29, per Lord Atkin.

[38] *Syndic in Bankruptcy of Salim Nasrallah Khaury* v. *Khayat,* [1943] A.C. 507, discussed 59 (1943) L.Q.R. 303.

[39] [1943] A.C. 311.

[40] It is a feature of modern systems of exchange restrictions that rates of exchange are being maintained at an artificially high level. This is being achieved by granting to a central bank or institution the monopoly of buying and selling foreign currency or of supervising dealings and thus of determining the local rate. See, e.g., Defence (Finance) Regulations, 1939, as amended, Regulations 2 and 5. The question whether such "dictated" rates are against the public policy of the forum should be answered in the negative.

What would have been the position, if, according to the contract, the place of payment had been in Madrid rather than in Gibraltar?

It is submitted that the rule contained in s. 72 (4) of the Bills of Exchange Act, 1882, is of general character and that, accordingly, the rate of exchange at the place of payment should prevail; this is the place where, according to the express or implied terms of the contract, payment ought to be made, as opposed to the place at which payment is actually made; it is the rate at the latter place which is to be applied within the ambit of s. 139 of the Merchant Shipping Act, 1894.

The principle contended for above is supported by a dictum of Vaughan Williams, L.J.[41] the accuracy of which has never been doubted:

> "The amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency *delivered at the appointed place of payment.*"

If the place of payment is Madrid, the difference there between the rate for notes and the spot rate will, as a result of Spanish exchange restrictions, only be fractional. Consequently, if a London merchant owes pesetas in Madrid, he will not benefit from the heavy discount at which peseta notes may be quoted in London, and on the other hand the creditor will receive the full amount to which he is entitled.

The result is that the practical significance of *Marrache* v. *Ashton* is reduced to a relatively small number of cases and that, in the majority of transactions, the spot rate will in effect have to be applied. That so palpable a discrepancy should flow from the situation of the place of payment may at first sight be surprising, but is not without justification. In connexion with problems of conversion it should be recognised as a paramount rule that the parties should neither suffer nor benefit from the conversion. If an Englishman owes pesetas in Madrid and if, therefore, he has to pay peseta notes to his Spanish creditor in Madrid, he cannot, under a system of strict restrictions of exchange, buy these notes in London, send them to Madrid and hand them to his creditor; for importation of such notes into Spain is prohibited. His only method of discharging his obligation is to buy in London a credit in Madrid (which he can do only on the basis of the rate for cable transfers or sight drafts) and then to instruct the Spanish bank to pay the notes to the creditor. In this way the creditor receives what he is entitled to, and if he is compelled to come to London to enforce payment and, for this purpose, to claim pounds sterling, he is justified in effecting the conversion at the spot rate which alone will produce such amount of sterling as will give him the contractual amount of pesetas in Madrid. On the other hand, if the pesetas are payable in London, no transfer of currency from one country to another is involved for the purpose, and within the meaning, of the contract:

[41] *Manners* v. *Pearson*, [1898] 1 Ch. 581, 592.

the creditor, it is true, will normally remit the money to his home country, but this is not a contractually relevant intention. In these circumstances, therefore, the debtor discharges his obligation by the payment in London of whatever is Spanish legal tender and if, in the event of non-payment, a conversion becomes necessary, the rate for such legal tender applies, because it produces the amount of sterling required to obtain in London the proper amount of Spanish legal tender. Such discrepancy as there may be is justified by and inherent in the terms of the contract. In many cases, perhaps, it arises from an accidental omission to clarify the contractual terms, from a misapprehension or a mistaken motive, from unsuccessful speculation or the popular illusion about the nature of monetary obligations which, let it be remembered, do not involve the payment of "value," but of legal tender. There is, moreover, nothing unusual in the result propounded here, since it is a not uncommon feature of monetary obligations that decisive and, at first sight, arbitrary consequences are derived from the situation of the place of payment.[42]

6. The rule that the rate of exchange prevailing at the place of payment is decisive may appear to lead to unsatisfactory results in those cases where neither party resides at that place. If a London firm owes a sum of Reichsmarks payable in Berlin to a Swiss firm, or, to revert to the facts in *Graumann* v. *Treitel*,[43] if a resident of Berlin promises to pay Reichsmarks in Berlin to another resident of Berlin and proceedings for the recovery of the money are brought in this country where both parties reside, it is tempting to argue that, had payment been duly made in Berlin, German exchange restrictions would have resulted in the creditor enjoying outside Germany only a fraction of the nominal amount paid by the debtor and that, therefore, the English judgment should give the creditor only such amount as he would have been able to transfer from Germany. Why, so it may be asked, should the non-payment of the debt and the necessity for bringing proceedings here have the effect of a wind-fall for the creditor? The idea of damage and restoration, however, is not germane to the issue. The debtor who has to discharge his promise to pay a fixed sum of foreign currency at a certain place is burdened with the debt wherever he resides. If his complaint were that his burden should not be increased by the demand of payment at another place (London), he might have a good case; but his argument that circumstances entirely extraneous to him should bring about a reduction of his burden, is incompatible with the nature of the bargain and the conception of debt. It follows that even in the circumstances envisaged in this paragraph the "official" rate must be applied and that, in particular, no regard is to be had to the price at which the creditor could have sold an account or credit balance accruing to him at the agreed place of payment upon the due payment of the debt. The suggestion that a creditor in the

[42] Cf. the influence of the place of payment, e.g., on the determination of the money of account.

[43] (1940), 2 All E.R. 188.

position of the plaintiff in *Graumann* v. *Treitel* would have obtained an "emigrants' blocked Reichsmark account" and that therefore the rate at which the Reichsmark debt should be converted into sterling should make allowance for the discount at which such blocked credits are saleable cannot be maintained.[44] Consequently it is not possible to subscribe to the theory underlying the decision of a Municipal Court of the City of New York in one[45] of the numerous[46] "ticket cases" which came before American Courts. The plaintiff had paid to the defendants' Vienna agency RM 420 to enjoy a credit of that amount on board one of the defendants' ships on which he intended to travel to New York. Since, owing to the outbreak of war, he could not travel by such ship, he claimed repayment of the "board money" in dollars at the "official" rate of exchange. The action was dismissed. After an elaborate discussion of the German currency system the Court pointed out that the defendants were liable to refund the board money in Vienna and that, if they had discharged their obligation there, the plaintiff would have received emigrants' blocked marks.

> "Such marks are not dealt in here or elsewhere outside of Germany and were not dealt in on January 26, 1940, the date of breach. They had no market value here on January 26, 1940, and the only way such Reichsmarks could be disposed of for dollars was to offer them for sale to the Deutsche Golddiskontbank in Berlin. That bank occasionally purchased such marks and in January, 1940, paid in Berlin for such marks was between 1·6 c. and 2 c. per mark . . . The restricted internal marks in which the excess board money deposit was repayable is without demonstrable foreign exchange value in dollars. The plaintiff cannot therefore recover dollars for them here."[47]

The fallacy underlying this reasoning is that the price at which blocked

[44] This suggestion was made in by far too definite and general a form by Mann, *l.c.*, p. 52, note 1.

[45] *Halpern* v. *Holland-America Line*, 1942, A.M.C. 786. In the same sense *Zimmern* v. *Holland-America Line*, 1941, A.M.C., 954 (New York Supreme Court).

[46] In many cases it was held that the contract was governed by German law, that its provisions precluded the plaintiff from claiming a refund in the United States and that this was not against public policy: *Steinfink* v. *North German Lloyd Steamship Co.*, 1941, A.M.C. 773 (New York Supreme Court); *Arnstein* v. *Compagnie Générale Transatlantique*, 1941, A.M.C. 1592 (Municipal Court); *Branderbit* v. *Hamburg-America Line*, 1942, A.M.C. 226 (New York Supreme Court); *Loewenhardt* v. *Compagnie Générale Transatlantique*, 1942, A.M.C. 735 (New York Supreme Court); *Schlein* v. *Nederlandsch Amerikaansche Stoomvart*, 1942, A.M.C. 1529 (New York Supreme Court); *Eck* v. *Nederlandsch Amerikaansche Stoomvart*, 1945 A.M.C. 70 (New York Supreme Court, Appellate Division.) But in *Kassel* v. *Nederlandsch Amerikaansche Stoomvart*, 1941, A.M.C. 335 (New York Supreme Court), the contract expressly provided for a refund, if owing to circumstances beyond his control the traveller was prevented from using the ticket; the Court allowed a refund at the official rate. This decision was followed in *Baer* v. *United States Lines*, 1942, A.M.C. 1461, and *Spiegel* v. *United States Lines*, 1942, A.M.C. 1462 (both decisions of a Municipal Court). The subject has been dealt with by Freutel, 56 (1943). Harv. L.R. 30, 51, *sqq*., who criticises the decision mentioned in note 45. See also M. Wolff, *Private International Law* (1945), pp. 481, 482, who says that "American Courts refused to apply the German currency laws." *Sed quaere.*

[47] pp. 796, 797.

accounts of a certain type can be sold is something entirely different from the rate at which the Reichsmark, a unit of account, may be converted into dollars. If the plaintiff had claimed arrears of interest, the defendants would not have been allowed to deduct an amount equal to the income tax which the plaintiff would have had to pay were he still resident in Germany or Austria; in the same way the loss or profit which the plaintiff would have made had the defendants paid at the agreed place of payment is no concern of the defendant.

In these cases there is only one argument on which a debtor may perhaps be entitled to rely. It will frequently be inherent in the creditor's claim that he requires payment at the place of the forum rather than at the agreed place of payment. In such circumstances it may seem justified to infer a contractual change of the place of payment with the result that the rate for legal tender prevailing at the place of the forum should be applied. Thus in *Graumann* v. *Treitel*[48] both parties had transferred their residence to this country; it was clear from the attitude adopted by the plaintiff both in Germany and in the course of the proceedings that he did not wish to be paid in Germany; the defendant, though he purported to prefer payment in Germany, was anxious to persuade the Court to apply the London rate for Reichsmark notes. Accordingly it would have been reasonable and legally justifiable to apply this rate.

7. The rule according to which a liquidated sum of foreign currency is convertible into sterling at the rate for legal tender is qualified not only by the necessity for applying the rate obtaining at the place of payment, but also by the possibility that the parties may have agreed upon a different rate. Such agreement may, of course, be expressed, but it may also have to be inferred from the circumstances.

The case which involves the greatest difficulties is that of an English contract between two English merchants which provides for payment of foreign currency in England. It is the true construction of such a contract that in fact the price will be paid in sterling.[49] On the one hand it may be argued that, if conversion into sterling was contemplated by the parties, it must have been the commercially usual rate, i.e. the spot rate, which they must have had in view for the purpose of the conversion; the case would thus be on the same level as that discussed in paragraph 3 above. On the other hand it may be said that, since the parties did not expressly include in their contract the clause "payable in sterling at the current rate of exchange" or similar words, there is no reason to interfere with the prima facie result that a liquidated sum of foreign currency is to be converted at the rate for legal tender. It is submitted that, while the latter solution is in conformity with principle and should, therefore, in general,

[48] (1940), 2 All E.R. 188. See above note 27. It is respectfully submitted that the learned Judge was right in holding that the place of payment was in London, though the reasoning, based on the evidence of the plaintiff's experts, is unconvincing and the effect should have been that the rate for legal tender should have been applied.

[49] See note 15.

prevail, there may be circumstances where the former method is more adequate. If, e.g., the English buyer knows that the goods sold to him by an English importer are of Spanish origin, if they have a market value in England which is obviously calculated on the basis of the spot rate and if the contract has been made after the introduction of exchange restrictions in Spain and the consequent establishment of a variety of widely differing rates, then it would be unreasonable to assume that the parties envisaged a conversion at the rate for legal tender.

8. The conversion of damages expressed in foreign currency is a matter of considerable difficulty, because their treatment in the law of money is throughout surrounded by many doubts.[50]

The damages may really be a liquidated amount. This is so, e.g., where the value of a thing at a certain place is to be restored: the seller fails to deliver goods at a place abroad and is therefore liable to pay damages measured by the market value at that place, or goods are converted by the defendant abroad. Similarly the damages are in effect liquidated, if an employee claims damages for wrongful dismissal. Here it seems appropriate to apply the rules developed above in connexion with the rate for debts.

Then there are cases where damages are at large, as, e.g., in case of a motor accident abroad. An English Court will probably assess them in sterling so that a problem of the rate of exchange is unlikely to arise.

Damages expressed in foreign currency may be suffered here. Thus in *Arcos Ltd.* v. *London & Northern Trading Company*[51] the plaintiffs were entitled to damages for the defendants' wrongful repudiation of a contract for the sale of Russian timber. The plaintiffs alleged that they had incurred expenses in storing the goods in Russia. Mackinnon, J. (as he then was) rejected the defendants' contention that rouble notes were obtainable at less than the rate for commercial transfers. The learned Judge did not investigate the question at what rate the plaintiffs in fact purchased or could have purchased the roubles which they spent in Russia. If, as may reasonably be assumed, there was no cheaper method available to the plaintiffs than to buy roubles in London at the spot rate, then the plaintiffs' point of view was clearly right. If, however, the plaintiffs had used funds standing to their credit in Russia, then the decision would seem to depend on where the plaintiffs desired the defendants to make restitution. If they required to be indemnified in London for the London value of a rouble credit in Russia, the spot rate was unlikely to be an appropriate measurement of the loss.

9. The absence of a rate of exchange indicating the relation between

[50] See Cheshire, *Private International Law*, 2nd ed., pp. 654, *sqq.*; M. Wolff, *Private International Law*, sect. 220; Nussbaum, *Money in the Law*, pp. 464 *sqq.*; Mann, *l.c.*, 180 *sqq.*

[51] (1935), 53, Ll.L.R. 38.

two currencies may be of a twofold character. The discontinuance of quotation may be absolute, i.e. dealings in a particular currency may be suspended altogether; this usually occurs in the course of a revolution or a civil war when, at least temporarily, there is nowhere any market for the currency of the country concerned. The discontinuance of quotation is relative, if there exists a rate of exchange as between a particular currency and some, but not all others. Thus in war-time, while the currency of a belligerent is quoted in allied and neutral countries, no rate exists as between the currencies of hostile countries; the difficult problems to which this situation gives rise are of great practical significance, yet neither in the last nor in the present war have they been authoritatively answered.

The absolute discontinuance of quotation will frequently be of short duration, and when a market has been re-established, the only problem that will arise is whether, in cases in which the date material to the conversion occurred during the period of suspension, the transaction should be liquidated on the basis of the rate prevailing prior to or immediately following upon the suspension. Probably the former rate should be adopted, because the law always presumes a given state of affairs to continue so long as it is not changed. Thus in *Pape Williams & Co.* v. *Home Insurance Co.*[52] the United States Circuit Court of Appeals (2nd) had to deal with a case where it became necessary to determine the market value of cotton at Barcelona on October 6, 1936, in terms of U.S. dollars. On September 21, the rate of exchange was $0·1365 to one peseta; on account of the Spanish Civil War no exchange rates were available from September 22, to November 13, 1936, when the value of the peseta was considerably depreciated. The Court held that in the absence of evidence it must be taken that on October 6, the cotton was worth the same in New York exchange as on September 21.

If a rate for the currencies of hostile countries has to be found with reference to a date during war, the value of the enemy currency is sometimes prescribed by law. E.g. under s. 1 (IV) (*d*) of the Trading with the Enemy (Custodian) Order, 1939, the Treasury may determine the rate appropriate for payments to the Custodian of Enemy Property. Apart from such provisions there are only two possibilities—should the creditor who is entitled to Reichsmarks in January, 1945, in London apply the pre-war rate or should he convert the Reichsmarks into Swiss francs and the resulting amount of Swiss francs into sterling? The former solution is arbitrary, because it excludes any real valuation at the material date. The rates quoted in neutral countries are probably much fairer. Their application is supported by the case of *Pollard* v. *Herries*[53] from which it may be deduced that the Court would be inclined to effect the conversion according to "the indirect course of exchange," and by an analogy derived from the law relating to the sale of goods; where for the purpose of assessing damages it is necessary

[52] 1944. A.M.C. 51; 139 F. (2d.), 131.
[53] (1803), 3 B. & P. 335.

to ascertain the market value of goods at the place of delivery, but when there is no market available at that place the market value at the nearest available place will usually have to be resorted to.[54]

In no event, however, should the interposition of a market in a neutral country lead to the indirect recognition of such enemy legislation as a belligerent country would never directly recognise. If, e.g., after the invasion of Holland the Germans should have fixed the Dutch guilder at a certain rate to which the Swiss quotations would give expression, it would be impossible to convert guilders into sterling on the basis of the Swiss rates; to do so would amount to sanctioning German control over the Dutch guilder. In such a case, therefore, an English Court would have to apply the rate between sterling and the Dutch Colonial guilder or, if no such rate should exist (as in the case of Norway or Poland),the rate which is usually accepted for transactions between the British and Dutch Governments.[55]

10. In conclusion it may be helpful to mention two cases which should be distinguished inasmuch as they do not really involve a problem of the rate of exchange.

(*a*) If *A* has a blocked pesetas account in Madrid which can only be used for specific purposes (e.g. the payment of Spanish taxes) and *B* agrees with *A* that he should use his Spanish account to pay taxes due from *B*, *A* cannot claim the sterling equivalent of the pesetas so spent, whether at the commercial rate or the rate for legal tender. The transaction, properly analysed, consists in the sale to *B* of a blocked pesetas account or part thereof. Hence *B* does not owe *A* a certain amount of pesetas, but a reasonable price for the credit sold to him so that, as a rule, he will have to pay such price as *A* would have realised had he sold his credit on the London market.

(*b*) In very many cases what at first sight appears to be a claim for a fixed sum, in fact is a title to a proportionate participation in a fund. If, e.g., under a German will *A* is entitled to a legacy of 10,000 Reichsmarks payable upon the death of a life tenant and the executor-trustee transfers the estate to England, the proper law applicable to

[54] *Rodocanachi* v. *Milburn* (1886), Q.B.D., 67, 76, per Lord Esher; *The Arpad*, [1934] P. 189 (C.A.); Halsbury (-Hailsham) XXIX, p. 194, note m. The view expressed in the text is, according to Nussbaum, *Money in the Law*, p. 129, supported by the decision of the Italian Supreme Court, 20th March, 1924, Foro Italiano, 1924, I, 587; see also Court of Appeal, Hamburg, Hanseatische Rechts-und Gerichtszeitschrift, 1917, 76; Staudinger (-Werner), *l.c.*, s. 244, note 6 (a); Ehrenzweig, *System des allgemeinen Privatrechts*, Vol. II (1928), p. 24. The opposite view seems to have been taken by the Austrian Supreme Court, 1st August, 1916, Zentralblatt für die juristische Praxis, 1917, 640, and Oesterreichisches Zentralblatt, 35, 1003, 932. The decision of the French Cour de Cassation, 3rd August, 1936, Clunet 1937, 302, on which Nussbaum, *l.c.*, relies has no bearing upon the point under discussion.

[55] See *Bank Mizrahi Ltd.* v. *The Chief Execution Officer Tel Aviv*, Palestine Law Reports 1943 (X) 364: while France was enemy-occupied territory, a debt expressed in francs was converted according to the rate fixed by the Palestinian Custodian of Enemy Property.

the matter, in this case German law, may provide that the legatee cannot claim a fixed sum at all, but a proportion of the estate to be ascertained in relation to the extent to which the testator's funds may have been transferred to this country. This, therefore, is a problem of the proper law rather than a problem of the rate of exchange.

F. A. Mann.

ON THE DEFINITION AND NATURE OF LAWS

THE more abstract a thing is the more difficult it is to define; and the concept of law is no exception to this rule. From the very earliest times, thinkers, both professional and lay, have attempted to define the law. But after centuries of thought and writing, they are still far from agreement. It is hardly an exaggeration to say that one can find as many definitions of law as there are jurists. We do not intend here to add to this confusion or even to discuss the nature of the law. Our purpose is relatively modest: to define and discuss the nature of laws. A law is a relatively concrete thing which can be isolated and analysed.

A law may be defined as a rule of human conduct that emanates from a source recognized as competent by the legal order and which prescribes the imposition of a sanction or penalty in the event of disobedience.[1] In primitive communities, and to some degree in developed societies also, the laws emanate directly from the people, i.e. from the undifferentiated mass of the subjects governed by them. It follows that no particular person or organ can be identified as their source. Such laws are called customs.

In the modern State, nearly all laws emanate from some organized body or authority having competence, either directly or indirectly, under the constitution.[2] Thus the laws may be enacted by some such specialized legislative organ as a parliament or by some organ which is primarily concerned with some other governmental function, e.g. a law court. Or they may be enacted by some subordinate body or authority to which an authority which itself possesses competence under the constitution has delegated legislative powers. Such laws are usually called statutes (when they emanate from a specialized legislative organ), judgments (when they emanate from a court), and regulations, by-laws, orders or decrees (when they emanate from some other organ). Unlike customary laws all of them emanate only indirectly from the people or subjects that they govern.

It is possible by the use of purely juridical techniques, namely, by referring to some higher norm, to prove the legal validity within the

[1] It will be noted that this is a definition of *a* law not of *the* law.

[2] By constitution we here mean the fundamental law of the land whether it is embodied in a "written constitution" or not.

legal order of such statutes, judgments, regulations, by-laws, orders and decrees. Thus, if a municipal corporation enacts a by-law limiting the speed of motor vehicles at street intersections, the competence of the corporation to enact the by-law can be tested by referring to the statute creating the corporation or to some other statute that confers powers on it. If the statute says that the corporation can regulate traffic within its jurisdiction, then any by-law enacted in accordance with the statute will be valid provided that the statute was itself a valid enactment. Whether the statute is itself a valid enactment will depend upon the competence of the authority enacting it. Under the Canadian constitution, the exclusive right to enact statutes regulating municipal institutions belongs to the provincial legislatures.[3] It follows that the statute conferring powers on the municipal corporation emanates from a competent authority if it was enacted by the legislature of the province in which the corporation is situated. But how about the constitution? Does it emanate from a competent source? Because of the special circumstances of Canadian constitutional history, it is possible to show that part at least of the Canadian constitution, including the rule relating to municipal institutions, emanated from a competent source; for the British North America Acts, which contain the written part of the constitution, are themselves statutes of the British parliament. But it is impossible by the use of purely juridical techniques to prove the validity of most constitutions, including the British, or to show why they should be obeyed, because no higher norm can be found which confers competence on the constituent authority. It is nevertheless true that some constitutions do attribute their validity to some higher norm. The constitution of Eire was enacted "in the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and of States must be referred." But this constitution like the constitution of the United States was declared to be enacted by the people. Needless to say, it is impossible by the use of juridical techniques, to prove the validity of the divine authority to which the Irish constitution is ultimately attributed. We could prove the competence of the constituent authority if we could say that it receives its competence from a higher international or supra-national law. But to prove the validity of the ultimate source of national law by reference to the international order, if this were possible, would simply be to transfer the difficulty to another sphere. In the international as in the national legal order, it is necessary to begin with some fundamental norm, the validity of which cannot be proved by juridical techniques. Thus it might be argued that, in the Byzantine Empire, the fundamental norm or axiom of Roman law was the maxim, *quod principi placuit legis vigorem habet*,[4] although the Roman jurists are careful to explain that the will of the prince had the force of law because the people had delegated their powers to him. The same maxim might serve as

[3] British North America Act, 1867, Section 92 (8).

[4] *The Institutes of Justinian*, 1.2.6.; *Digest*, 1.4.1.1.

the apex of the legal pyramid in some modern dictatorships. It could be of no use in any other kind of State. We suggest, however, that the rule, *quod principi placuit legis vigorem habet*, was simply a rule of Byzantine constitutional law, and that the fundamental norm of the Byzantine legal order was the rule that the constitution was to be obeyed. The rule that the constitution shall be obeyed is also the fundamental norm at the apex of all other national legal systems. As jurists we cannot say why the constititution should be obeyed, although it is undoubtedly possible to find a sociological or political reason in the necessities of group life. But if we assume that the constitution should be obeyed, we can prove, by purely juridical techniques, the validity of all the subsidiary sources of law.

The second test of a law is that it must be sanctioned. As in the case of many other words in the jurist's vocabulary, the meaning of the term "sanction" is elusive. The word has many different meanings, both in ordinary language and in juridical science. A reference to the *Oxford Dictionary* will show that it sometimes means a law or a decree, e.g. the Pragmatic Sanction; that it sometimes means a penalty for disobedience or a reward for obedience of a law; that it sometimes means that part of a law that provides for a penalty or reward; that it sometimes means any consideration operating to enforce obedience to any rule of conduct; that it sometimes means the confirmation or ratification of a law or other norm by some authority; and, finally, that it sometimes means an express authoritative permission, countenance or encouragement given to action etc. Etymologically, the word derives from the Latin, *sancire*, which meant to make sacred. To the Roman jurists of imperial times the noun *sanctio* meant that portion of a *lex* that prescribed the penalty[5] and, sometimes, the whole of the *lex*.[6] They do not seem to have ever used it to indicate the penalty itself for which they had another word, *poena*. We are not here using the word, sanction, in the Roman sense. Nor indeed are we using the word in the sense in which they used *poena* although that is a closer approximation to our meaning. When we say that a law must be supported by a sanction, we do not mean that the formal statement must necessarily include some provision (*sanctio*) for a penalty or a reward. A law may be sanctioned without provision being made in it for its sanction; for the legal order may provide for the sanction in other ways. The sanction may be and often is to be found in a general disposition supporting many norms. Thus, article 164 of the Canadian Criminal Code provides that "every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any act of the Parliament of Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punish-

[5] "*legum eas partes, quibus poenas constituimus adversos eos qui contra leges fecerint sanctiones vocamus.*" *Justinian, Institutes*, 2.1.10.

[6] See P. S. Wild, *Sanctions and Treaty Enforcement* (Harvard, 1934), p. 44.

ment is expressly provided by law."[7] In theory, indeed, there is no reason why the legal order should contain more than one sanctioning disposition, namely, a provision to the effect that any violation of any rule emanating from a source recognized as competent should be followed by such or such a penalty. The penalty, moreover, may have its source in customary enactment. A customary penalty can support either a customary or a statutory statement of desired conduct just as a statutory penalty can support either a statutory or customary rule.

The necessary sanction is some pain, penalty or deprivation[8] (whether expressly provided for in the norm or not) to be suffered by anyone who violates the law, or some reward to be given to him if he obeys it. It will be noted that this definition differs considerably from the Austinian definition of sanction as "the evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken."[9] In the first place, we do not limit our concept of laws to the commands of a superior authority, unless, indeed, the term superior authority includes the legal order.[10] Secondly, we do not say that sanctions are limited to evils. As Jenks says, "the view that a legal sanction can only take the form of a penalty appears to be a survival of the now discredited claim that 'all laws are commands' and to the fact, unfortunate but quite intelligible historically, that human lawgivers have found, or think that they have found, that penalties are more effective in securing observance of their laws than rewards."[11] He might have added that laws are normally obeyed and only exceptionally violated. The normal man disobeys very few laws; but he obeys thousands of them every day. To provide for the disobedience of laws therefore represents an economy. It is doubtful, moreover, whether society could offer rewards sufficiently attractive to induce compliance with all laws. What reward, for example, could be given to the man who refrains from murdering his neighbour? In many cases, however, the

[7] And see article 14 of the Quebec Civil Code: "Prohibitive laws import nullity, although such nullity be not therein expressed."

[8] Salmond has pointed out that a sanction is not necessarily a pain or penalty in the strict sense. "To punish law-breakers is an effective way of maintaining the law, but it is not the only way. The State enforces the law not only by imprisoning the thief, but by depriving him of his plunder and restoring it to the true owner; and each of these applications of the physical force of the State is equally a sanction" *Jurisprudence* (7th ed.), p. 23. The sanction of nullity is particularly important in the civil as compared to the criminal or penal law. Cf. article 14 of the Quebec Civil Code.

[9] John Austin, *Lectures on Jurisprudence* (5th ed.), p. 89. Blackstone had already defined sanction as "the evil that may attend the breach of public duties." *Commentaries*, Bk. IV, chap. 5, 67. And see Pollock's definition of sanction as "the appointed consequences of disobedience." *First Book of Jurisprudence* (5th ed.), p. 23.

[10] The views of the analytical school are discussed by P. S. Wild, *Sanctions and Treaty Enforcement*, *op. cit.*, p. 49 *et seq.* This author seems to be unaware of the fact that there are jurists of the analytical school who do not accept Austin's definition of a law as the command of a political superior. Nowhere, for example, does he discuss the views of Kelsen.

[11] Edward Jenks, *The New Jurisprudence* (London, 1933), p. 120.

purpose of the sanction (which is to induce obedience of the law) can be served not only by a promise of an evil but also by a promise of a reward. But since, where the sanction takes the form of a reward, the withholding of the reward is the penalty for illegal conduct, it is nevertheless possible to say that in all cases a sanction is some pain, penalty or deprivation to be suffered by anyone who violates the law.

It is the sanction that gives the law its enforceable character. Rules that are not supported by sanctions can be disobeyed with impunity: they are mere recommendations. But legal rules are not the only rules that are supported by sanctions. All rules of human conduct, including the rules of morality, have sanctions. If a man violates a rule of the moral code, his act may produce a social reaction which will be more or less serious according to circumstances. This reaction may amount to no more than social disapproval. But whatever the moral sanction is, it is always possible to distinguish it from a legal sanction. Legal sanctions are sanctions provided by the legal order in the name of which they are also imposed. Moral sanctions are not provided for by the legal order, and, indeed, usually could not be, because the legal order cannot control the kind of social reactions that give them form. We do not mean to suggest that a moral sanction cannot be, in the words of the *Oxford Dictionary* quoted above, a "consideration operating to enforce obedience" of a legal rule. In this sense a law may have all kinds of sanctions. In some cases the moral or other sanction may even provide a more effective incentive to obedience than the legal sanction. It is not merely the fear of the legal sanction that restrains the civilized man of the twentieth century from stealing his neighbour's goods. This is another way of saying that the same act may be a violation of both a legal and a moral rule. Murder, for example, is both illegal and immoral, and will ordinarily result in both legal and moral sanctions. In other cases, conduct prescribed by the law may be a matter of moral indifference. It is of no moral consequence whether motorists drive on the right or on the left side of the street; but the law very properly limits the freedom of its subjects in such matters. To say, however, that the conduct prescribed by the law may be a matter of moral indifference is not to say that the moral code could be indifferent to a violation of a legal rule whatever its content, although cases can be imagined in which moral duty might involve the violation of a law, for example, when a traffic regulation is broken in order to save a man's life.[12] It is also true that the conduct prescribed by the moral code is often a matter of legal indifference; and the law is indifferent to violations of that code unless the moral offence also happens to be a legal offence.

As we will see later, the threat of a penalty may not be sufficient to induce people to act in the way desired by the law. Or the law may be obeyed for some other reason. The principal factor in securing

[12] C. S. Kenny says that there is no English case in which the defence of necessity has been successfully raised in such a case. *Outlines of Criminal Law* (15th ed.), p. 86.

obedience may not be the legal sanction at all but some other factor such as the sense of right of the persons to whom the law is addressed. But the existence of one or more of these inducing factors is not sufficient to give a rule the character of a law if the legal sanction is lacking.[13] Thus, public opinion is an important factor in securing obedience; but a rule that is sanctioned by public opinion only is not a rule of law.

It is sometimes said that whereas the sanctions of law are organized reactions of society, the sanctions of morality are unorganized. This distinction holds only if by organized sanctions we mean sanctions organized by the legal order. It does not hold if we mean that legal sanctions must be imposed by some organized political or governmental agency; for legal sanctions are sometimes imposed by the individual victim of the violation (self-help). In such a case, the individual self-helper is acting as a legal organ. He is acting, that is to say, under authority delegated to him by the legal order. But he is hardly a political organ in the ordinary meaning of that term. In the modern State, however, most if not all legal sanctions are imposed by State organs, one of the most characteristic features of the modern State being its legal monopoly over the means of coercion.

The primary purpose of all sanctions is to induce conduct in conformity with the standard or standards desired by the law.[14] But this primary purpose is rarely if ever completely achieved; for the threat of sanctions is not usually strong enough to discourage all disobedience. Disobedience is indeed contemplated by the law which makes it the condition necessary for the imposition of the sanction. But the imposition of the sanction is not an act of social vengeance only; for, when invoked, the sanction may have accessory purposes other than the punishment of the offender. One such accessory purpose is the protection of society against repetitions of the offence. The punishment of the offender serves as a deterrent to others who might be tempted to commit the same offence. In so far as the offender himself is concerned, the purpose may be achieved by depriving him of his liberty or, in extreme cases, by eliminating him altogether. Capital punishment, however, is in increasing disfavour. Indeed the whole science of penology is in a state of flux; and the modern tendency is to use the imposition of the sanction as a means of redeeming the offender for society. In other cases, the accessory purpose of the

[13] It is for this reason that we reject P. S. Wild's definition of a legal sanction as "the means of ensuring enforcement or the means of inducing observance of law." *Sanctions and Treaty Enforcement, op. cit.* p. 57.

[14] "It is . . . the immediate object of all psychical laws to influence the human will in such a manner as to stimulate it to inspire the subject's conduct in the direction of rightness, or righteousness. Unfortunately, however, the human will may, unless forewarned or influenced in the 'right' direction, be stimulated not towards action in that direction, but in a totally opposite, or at least, different direction, by influences of many kinds. To meet this difficulty, it is deemed necessary for the lawgiver to influence the human will in the desired direction by the promise, or threat of sanctions. . . . ." Edward Jenks, *The New Jurisprudence, op. cit.* p. 34.

sanction may be to redress the wrong or to restore the legal situation as it was before the violation. This is characteristic of the sanctions of the civil law where the right of the victim is ordinarily limited either to an action to recover the damages that he has suffered[15] or to an action in declaration of the nullity of the illegal act.

Since the primary purpose of the sanction is to induce obedience of the law, the appointed evil must be something to which the violator would not have been exposed had he obeyed the law; for, if the violator were exposed to the evil in any event, the fear of it would not serve as an inducement to lawful conduct. It follows that the penalty, pain or deprivation must be something from which the law ordinarily protects the violator. A sanction is some act that would itself be illegal were it not for the fact that it is being imposed in consequence of some violation of the legal order.[16] While the promotion of peace is one of the principal objects of the legal order, that order does not preclude the use of force; for force is the principal means by which it achieves its end. This is done by making force a monopoly of the legal order, which is another way of saying that resort to force in cases not indicated by it is illegal. The resort to force, which in ordinary circumstances is illegal, becomes legal when invoked as a sanction in reaction to a violation of law. Reciprocally, the act of force which is legal when indicated by the law would have been illegal otherwise. It may be noted in passing that this characteristic of legal sanctions indicates another difference between legal and other sanctions. For, whereas a legal sanction is always some act which would itself be illegal were it not for the fact that it is the legal consequence of an illegal act, a moral sanction, for example, is not an ordinarily illegal act; and, if by chance it were, it would not lose its illegal character by virtue solely of the fact that it is imposed in consequence of a violation of the moral code. Thus the social reaction to certain offences in the southern states of the United States is sometimes lynching. But the lynching does not thereby become a legal, or indeed even a moral, act. On the other hand, the execution by a public authority of a capital sentence against a criminal who has violated the law prohibiting murder is not an illegal act. But it would

[15] The *actio ad rem persequendam* as compared to the *actio ad poenam persequendam.*

[16] Hans Kelsen, *Law and Peace* (Harvard, 1942), p. 12. "Law is an organization of force: the law attaches certain conditions to the use of force in relations among men. It authorizes the employment of force, acts of coercion, only by certain individuals and only under certain circumstances. The law allows, under certain circumstances, conduct which under all other circumstances is 'forbidden,' or in other words is the very condition for similar conduct on the part of another as a sanction. The individual who, authorized by the legal order, applies the coercive measure—the sanction—acts as the organ of this order or of the community constituted thereby. Only this individual, only the organ of the community, is authorized to employ force." And see *ibid.* p. 13: "Law is an order according to which the employment of force is generally forbidden as a delict, but exceptionally under certain circumstances, and for certain individuals, permitted as a sanction. In the rule of law, the employment of force appears either as a delict (the condition of the sanction) or as the sanction (the reaction of the legal community against the delict)."

be illegal even for a public authority to put a man to death in circumstances not indicated by the legal order.

We have said that a legal sanction is some ordinarily illegal act that becomes legal by virtue of the fact that it is performed in enforcement of the law. We did not say that any illegal act can be rendered legal simply by resorting to it as a sanction. Only those ordinarily illegal acts that are designated by a competent legislative authority as sanctions become legal when resorted to as such. And they can be resorted to only in the cases and in the manner indicated by the law. Thus, in civilized countries, the law does not permit lawbreakers to be tortured. And, while capital punishment is still the penalty for murder even in many civilized countries, some less serious penalty is ordinarily the sanction of theft. It follows from what we have said that legal sanctions should be precisely defined.

A law is nothing more than a threat the object of which is to induce the conduct desired by it. There is no guarantee either that the people to whom the law is addressed will act in the manner desired by the law or even that those who violate it will be punished. A law simply says that in the event of conduct contrary to that desired by it the violator *should* or *ought* to be punished. The sequence contemplated by the law is one between the violation and the sanction, not between desired and actual conduct. This sequence is not always clearly stated in the formal statement of the law which may even, as we have seen above, make no reference to the sanction the provision for which somewhere is nevertheless essential to the law's validity. In some laws, on the other hand, the sequence between violation and sanction is clearly stated.[17] This sequence, moreover, is not inevitable. It often happens that an offender against the law will not be discovered, that there will not be enough evidence to convict him, or that he will escape the appointed evil for some other reason. The law prohibiting murder provides no guarantee that there will be no murders nor does it even guarantee either that all murderers will inevitably be caught or that, if they are caught, they will inevitably suffer the penalty provided by the law.

It is in this that legal rules are distinguished from the so-called laws of natural or physical science. A law of natural science is a statement of observed facts and sequences in nature. Repeated observation has shown that certain causes are inevitably followed by certain effects. It is therefore assumed that the same causes will always be followed by the same effects; and this assumption is expressed in the form of a "law" or hypothesis. For example, it has been observed that an unsupported body will invariably fall. The expectation based on this observation is expressed in the familiar law of gravity. If, as the result of further observation, it is found that the assumed sequence does not occur, the "law" must be abandoned

[17] See, for example, article 263 of the Canadian Criminal Code: "Every one who commits murder is guilty of an indictable offence and shall on conviction thereof be sentenced to death."

and a new one stated which will take into account the newly observed phenomenon. It is an essential characteristic of so-called physical laws that they cannot be violated and remain valid. Nor is there any question of sanctions in the physical sciences. When a medical doctor tells a patient that over-eating will result in physical disorder, he does not mean that sickness is the sanction of the rule not to over-eat. He is stating a sequence of cause and effect.

It would certainly be wrong to say that legal norms of conduct are made to be broken; but, since the only sequence contemplated by a law is the sequence between violation and sanction, laws only operate in the technical sense when they are violated, that is, when actual conduct is contrary to the required behaviour. And it is common knowledge that laws often are violated. But, knowing this, we do not say that the laws are not valid laws. It is an essential characteristic of a rule of conduct that it can be disobeyed without it being necessary to formulate a new rule. The persons contemplated by the law can disobey it; but, if they do, they run the risk of suffering the sanction indicated by the law.

Examples can even be given of laws that are habitually disobeyed. The prohibition laws in the United States and Canada in the period after the first World War were probably honoured in their breach as much as in their observance. But while it can be argued that these were socially undesirable laws, there can be no doubt that they were formally valid. Indeed, the prohibition law in the United States possessed a particularly formal character, because it formed part of the constitution. In the Province of Quebec, the law once required all vehicles to come to a stop at railway crossings.[18] This rule was not only habitually disobeyed but very little attempt was made to enforce it. While they may be formally valid, such unenforced and unenforceable laws are, of course, socially undesirable, because they engender disrespect for the law in general. One of the tests of good government is that there should be adequate provision for the enforcement of the law. While the sanction is never inevitable, the possibility that offenders will go unpunished should be reduced to a minimum.

From what we have said it should be clear that the technique of the jurist is fundamentally different from the technique of the natural scientist. The jurist tests his law by looking backwards. He asks himself whether the rule emanates from a competent source or authority. If he finds that this is the case and that the rule is formally supported by a legal sanction, he says that it is a valid law, although he may reserve the right to criticize its social expediency. The natural scientist, on the other hand, tests his law by observing the phenomena of nature. If he finds that certain sequences invariably occur, he expresses his discovery in the form of an hypothesis. But he can maintain his hypothesis only so long as it provides a true description of observed facts.

It is only since comparatively recently that men have been able

[18] *Quebec Motor Vehicle Act*, R.S.Q., 1925, chap. 35, section 41a.

to analyse the validity of their laws in the manner outlined above. Primitive peoples ascribed the origin and validity of their laws to supernatural sources. This tradition was taken over by the natural law school. There exists, according to the naturalists, a body of natural law which can be discovered by man through the exercise of his reason. This natural law is said to be both anterior and superior to positive or man-made law which is only valid if and in so far as it conforms to the dictates of natural law. At least two important consequences flow from a belief that laws have a supernatural source. The first is that the sacred character of the law helps to compensate for the rudimentary character of the sanctions, when this is the case as in primitive law. If men believe that a rule of conduct is supernaturally ordained, they will obey it whether or not there are adequate man-made sanctions. Divine sanctions are usually thought to possess the same inevitable character as the sequences of nature, although the fact that men will pray for forgiveness indicates that they really believe that the sanctions of supernatural law are not inevitable. The fact that the origins and validity of primitive law are believed to be supernatural should always be born in mind whenever the operation of self-help as a legal sanction in primitive communities is compared to the same institution in international law.

A second consequence that flows from a belief that laws have a supernatural source is that, in societies where this belief is general, the modification of the law is a very serious matter and will be undertaken only with great hesitation and under exceptional circumstances. It is a significant fact that, up until comparatively recent times, even the most powerful conquerors hesitated before changing, at least openly, the laws of the peoples whom they had subdued. And even to-day, it continues to be a rule of British public law that the private and part of the public law of a conquered territory is not changed by the mere fact of conquest.

JOHN P. HUMPHREY

THE OPERATION OF NULLITY DECREES

A MAN and woman go through a ceremony of marriage. After the ceremony the man discovers that the woman is physically incapable of consummating the marriage. He is advised that a petition in the Probate, Divorce and Admiralty Division of the High Court will undoubtedly secure him a decree of nullity, but he scorns the advice and goes through a ceremony of marriage with another woman. With one accord the textbooks declare that the second marriage is a nullity and any issue is bastard, and that the man has committed the felony of bigamy. It is intended in this article to throw doubt on these propositions. It is proposed to show that the generally accepted law on this matter has been constructed on a

foundation of misunderstanding and in so far as it is law it is bad law, and happily still open to review by our courts.

The common learning on this subject is that invalid marriages are of two types: a void marriage, which is void *ab initio* and therefore not a marriage at all, and a voidable marriage, which subsists until avoided by a decree of nullity obtained from the court. Consequently, until such decree of nullity is obtained in the case of a voidable marriage the spouses are duly married, and an attempt by a spouse to marry another is a nullity and the felony of bigamy.

The first flaw which appears in this convenient dichotomy is the form of decree given by the court, and this happens to be the same in both cases. The voidable marriage is 'declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever,' and the petitioning spouse is declared 'to have been and to be free from all bond of marriage.'[1] If the marriage *has* been absolutely null and void and the spouse *has* been free from the bond of marriage there is ground for suspicion that the marriage was not voidable but really void *ab initio*. However, before we proceed further, and in order to guard against confusion in the use of terms, let us first understand what we intend by 'void' and 'voidable.'

Lawyers are interested in acts only in so far as they produce legal consequences. It is tempting to assume that void acts are acts which fail to produce legal consequences, but this overlooks the fact that an act may fail to produce some intended legal consequences and yet produce other unintended legal consequences. A forged signature may be barren of consequences in the Chancery Division but pregnant with consequences at the Old Bailey. The criterion is in the relation between the act and the intended consequences. An act which fails to achieve the intended legal consequences is void: if it does achieve the intended legal consequences it is valid.[2]

Now for the voidable act. In the first place we must not be misled by the fact that many acts will be supposed to achieve the intended legal consequences until someone demonstrates that this is not so. Two parties may enter into a contract prohibited by law and act for years on the assumption that the contract is binding. When one party discovers the existence of the prohibition and denounces the contract he may be said to avoid it, but no one regards such a contract as voidable. Nor must we confuse the voidable act with the act which includes among its intended legal consequences the power of a party to determine those consequences. A contract with a resolutive condition is not a voidable contract. At first sight it would appear that a voidable act is an act in respect of which a party affected by the act can decide whether the intended legal consequences shall ensue or not, and most of the definitions of voidable acts support the view

[1] Rayden, *Divorce*, 4th ed. Form 95, p. 705.

[2] We can note, though not complicate the problem by considering, that an act may achieve some intended legal consequences but fail to achieve others.

that there is some power of election reposing in a party,[3] but this must be a superficial view, for it is the prerogative of the courts to attach legal consequences to acts and not the function of private individuals. A more exact analysis suggests that a voidable act is an act which gives rise to the intended legal consequences, but at the same time gives rise to a counteractive right which may neutralise those consequences in so far as one of the parties is concerned. The party in whom is vested the counteractive right cannot deny the existence of the act nor that the intended consequences should follow, but he may assert his counteractive right. For example, if *A* is induced by fraud to enter into a contract with *B*, *B* can assert that the usual legal consequences ensue and that a contractual obligation exists. *A* cannot deny this, though he can assert his counteractive right which will, in certain circumstances, in effect loose him from the obligation. *A's* defence when sued on the contract is not the defence of the negation of a right in the plaintiff but the assertion of a counteractive right in himself.

This point is of considerable importance, for it becomes clear that when a party affected by a voidable act asserts his counteractive right he does not thereby avoid or make void the act. The legal consequences of the act remain unaffected and it is a perfectly valid act except in so far as it is opposed by the counteractive right. And this analysis provides a satisfying explanation of some of the incidents of the voidable act. For example, in the law of contract we are told that a contract which is induced by fraud is voidable at the instance of the party deceived, and then we are given a string of exceptions where it is not voidable. Whenever exceptions tend to swamp the rule there are grounds for suspicion that something has gone wrong with the analysis, and it is more satisfactory to say that a contract induced by fraud is valid, though the party deceived has a more or less limited counteractive right. Again, we are told that a contract which is induced by fraud is voidable because fraud vitiates the agreement which is essential to the formation of every contract, and generations of law students have been puzzled to know why it is that persons other than the party deceived cannot take advantage of this most fundamental defect. We can now see that what we have been told is inaccurate. Fraud does not vitiate consent: a contract induced by fraud is based on a real consent and is perfectly valid,[4] though out of the fraud may arise a counteractive right which nullifies its operation against the party deceived. Nor does this analysis lack historical support, for both in English law and in Roman law we start from the position that a contract induced by fraud is completely binding, and it

[3] "The word 'voidable' means, I suppose, that the result may be made void by someone." Markby, *Elements of Law*, 3rd ed., sect. 274. "[An act] which may take effect, but is liable to be deprived of effect at the option of some or one of the parties, is said to be voidable." Pollock, *First Book of Jurisprudence*, 2nd ed. 161.

[4] To such an extent is it valid that even the fraudulent party can maintain its validity against a third person. *Stevenson* v. *Newnham* (1853), 13 C.B. 285.

is only at a later date that the party deceived is given his counteractive right, which at first he must assert in independent proceedings.[5]

We can now turn to the voidable marriage.[6] If the form of the decree pronounced in annulling such marriages accurately represents the position the marriage is void *ab initio*: the act never gave rise to the intended legal consequences. A marriage which is void leaves the 'spouses' unmarried, the issue of the marriage is bastard, and the parties are free to marry again at will, without fear of conviction for bigamy and in the knowledge that their second marriages will be valid. On the other hand, a marriage which is truly voidable will be perfectly valid for all purposes except in so far as opposed by the counteractive right: the issue of such a marriage is legitimate and all the usual consequences of the status of marriage will follow until the party in whom is vested the counteractive right takes steps to enforce his or her right. The use of the terms 'void' and 'voidable' in matrimonial law has been criticised on the ground that terms and concepts applicable only to contract law are employed,[7] but it is submitted that the terms are as applicable to marriage as to any other act. The difficulties are caused by the fact that the terms are misused, most of the marriages which are termed voidable being really void. An example of a truly voidable marriage is the marriage at common law of persons within age.[8]

Before we proceed further in our investigation we must resolve to guard against confusing the legal consequences of the status of marriage with the legal consequences of a reputed marriage. When the *de facto* marriage relationship subsists between a man and a woman, as long as they cohabit many of the usual consequences of wedded cohabitation will ensue. Thus, when a marriage is annulled for impotency the man can assert that during the subsistence of the cohabitation he was a husband for the purpose of bringing trespass *pro uxore abducta*,[9] or for obtaining a married man's allowance on his Income Tax assessment,[10] and others can assert that he was husband enough to be liable for the woman's debts.[11] Such cases prove nothing.

In the hundred years which lay between Lord Lyndhurst's Marriage Act of 1835,[12] and A. P. Herbert's Matrimonial Causes Act of 1937,[13] there was only one type of voidable marriage, the marriage which was

[5] In Roman law at first the victim of fraud must perform his obligation without question; later he could recoup himself by bringing the *actio doli*; in the last stage he had the *exceptio doli*. In English law as late as the nineteenth century a plea of fraud was no defence to an action on a specialty: the defendant was left to his remedy in equity. *Mason* v. *Ditchbourne* (1835), 1 M. & Rob. 460.

[6] The theme of this article is that the so called voidable marriage is really void and that "voidable" is a misnomer, but to prevent confusion I use the expressions "void marriage" and "voidable marriage" to describe those marriages to which these terms are generally applied to-day.

[7] Scott, L.J., in *Adams* v. *Adams*, [1941] 1 K.B. 536 at 541.

[8] See the cases cited in Comyns, Dig. Baron et Feme, B (5).

[9] *Morris & Webber's Case* (1586), 2 Leon. 169.

[10] *Dodworth* v. *Dale*, [1936] 2 K.B. 503.

[11] *Antsey* v. *Dale* (1818), Gow. 10.

[12] 5 & 6 Will. IV. c. 54.

[13] 1 Ed. VIII & 1 Geo. VI. c. 57.

annulled on the ground of physical incapacity, but mediaeval law knew others. 'Note,' says a Year Book reporter of Edward III's reign, 'that there may be divorce[14] in five different ways, viz. *causa professionis*, *causa praecontractus*, *causa consanguinitatis*, *causa affinitatis*, *et causa frigiditatis*.'[15] Decrees of nullity on the ground of consanguinity or affinity were a common feature of mediaeval life, for the church's rules, with their extensions of quasi-affinity and spiritual kinship, were so intricate and far-reaching that Maitland has said that spouses who quarrelled were unlucky if they could not unearth some impediment which would annul the marriage.[16] And besides this voluntary divorce there was always the possibility of some prying commissary or a malicious neighbour discovering an overlooked impediment.[17]

The church's decree of nullity proceeded, as does the modern decree, on the footing that there never was a marriage, and logically the church should have held that the issue was bastard. The Eastern church remained logical, but the Western church, under Gallican influences, abandoned logic for a more charitable view in the twelfth century and erected the doctrine of the putative marriage. If a man and woman had blundered into an invalid marriage through ignorance, the invalidity of the marriage must be declared, but there was no reason to punish their ignorance by bastardising the issue. Such was the church's view, and since there was no other law of marriage at that time besides '*le ley de Seint Eglise*' it was the law of England.[18]

That at any rate was the position in the twelfth and thirteenth centuries, but in the fourteenth century the attitude of the king's courts began to change, and by 1373, the issue of an annulled marriage was considered as bastard.[19] Why did this change take place? Maitland could give no explanation except that the courts had lost touch with canon law.[20] We incline to think that the ultimate view of the king's courts was arrived at in this way. It became necessary for the king's courts to develop a theory of their own on this question of bastardy, partly because there were already certain aspects of this matter on which the two jurisdictions had agreed to differ,[21] and partly because

[14] In mediaeval times the term "divorce" is frequently applied to nullity proceedings, since the main purpose of such proceedings was to separate *de facto* spouses.

[15] Y.B. 47 Ed. III, Mich 78.

[16] P. & M. ii, 391.

[17] Y.B. 39, Ed. III, f. 31. Thomas married a wife and had issue. After Thomas and his wife were dead the bishop's commissary was informed at a visitation that Thomas had stood godfather to Alice who was the wife's cousin. Proceedings were thereupon taken in the bishop's court and the marriage was annulled.

[18] Glanvil, vi. 17.

[19] Y.B. 27 Ed. III, Mich, f. 78. An exception, for obvious reasons, was made in the case of a marriage annulled *causa professionis*. The changing view can be traced in Y.B. 11, Ed. II (S.S.) 262; Y.B. 11 and 12, Ed. III (R.S.) 484.

[20] P. & M. ii, 375.

[21] For example, the church's view that bastards could be legitimated *per subsequens matrimonium*, and that issue born in wedlock was bastardised if engendered in adultery had already been rejected by the king's courts.

to wait on the ecclesiastical courts would involve intolerable delays.[22] Therefore resort was had to logic, and it was so simple to say that since there never had been a marriage, which was what the church had declared, the issue must necessarily be bastard. To say that a marriage was a nullity and yet could produce consequences like those of a valid marriage was fantastic, or, as the lawyers of the Year Books preferred to put it, 'inconvenient.'[23]

But however the older rule came to be changed, changed it was, and from the fifteenth century all lawyers were agreed that the children of a marriage which was annulled were bastards. The rule was not harsh in its operation once the mediaeval extravagances which had collected round the conceptions of consanguinity and affinity were cleared away,[24] for persons who married within the prohibited degrees must either have done so wittingly or through gross negligence, and the child of a marriage which was annulled *causa frigiditatis* was thought to be an impossibility until 1934.[25]

If the law came out strongly for the view that the issue of an annulled marriage was bastard because the marriage was void, how came it about that later generations thought the marriage was voidable? It cannot be merely that the marriage stands until attacked: many nullities will be reputed valid until someone shoulders the burden of proving the contrary, for, as we have seen, the truly voidable act is one which produces most legal consequences even when the defect is demonstrated.

We think that the changed view was the combined result of three independent causes. The first was the development of certain doctrines in connection with proceedings for nullity which, though quite consistent with such marriages being void *ab initio*, certainly lent colour to the view that they were voidable. The second was a natural misunderstanding of the peculiar sense in which Coke chose to use the word 'voidable' in relation to a marriage. The third was a blunder of Lord Holt.

In the middle of the fourteenth century the king's courts imposed a restriction on the operation of decrees of nullity in the ecclesiastical courts. In order to bastardise the issue, nullity proceedings must have taken place in the lifetime of the spouses.[26] Various reasons are assigned for the rule. Sometimes it is said that a divorce after the death of one of the parties is ridiculous since death has already

[22] In Y.B. 39 Ed. III, f. 31, Thorpe, C. J., said that the bishop's certificate might be delayed for twenty years by appeals.

[23] "*Et a l'auter entent que le primer espousels serront defetes et que il serra mulier, Sir ceo ne point pur l'inconvenience, car le jugement en chescun devorce est d'adnuller le primer espousels.*" Suliard in Y.B. 18 Ed. IV, f. 29. In the same case Choke, J., said: "*Et Sir quant un devorce est plede, il serra entend a nous que les espousels sont utterment defetes, en quel case l'issue ewe devant est bastarde.*"

[24] We speak of harshness to the parents. Any bastardy rule operates harshly against the innocent bastard.

[25] *Clarke* (otherwise *Talbott*) v. *Clarke* (1943), 3 All E.R. 540.

[26] Y.B. 39 Ass. pl. 10. The rule was repeatedly followed in the following centuries: Y.B. 11, Hen. IV, f. 78; Brooke, Abr., Bastardy 44, citing Y.B. 24. Hen. VIII; *Rennington* v. *Cole* (1618), Noy 29: *Betsworth* v. *Betsworth* (1647), Style 10.

dissolved the marriage,[27] sometimes it is said that in a divorce *post mortem* one party, the deceased, suffers under the handicap that he cannot be cited,[28] and sometimes it is said that a divorce *post mortem* is only for spiritual purposes—*ad inquirendum de peccatis*—and if it seeks to go further it is an attempt on the part of the ecclesiastical courts to meddle with questions of inheritance.[29] Of this choice of reasons we prefer the last. If an ecclesiastical court chose to annul a marriage where one or both of the spouses were dead, the decree would be destitute of earthly consequences unless it were to decide the civil status of the issue of the marriage, and these *post mortem* divorces could only be regarded as an attempt by the church courts to wander outside their proper sphere, an attempt which must be stopped by Prohibition when detected.[30]

The fact that death of one of the parties to a marriage foreclosed all opportunity of testing its validity naturally suggested that the situation was that the marriage was valid unless attacked in the lifetime of the spouses. Added to this comes another doctrine, that the attack can only be made by one of the parties, and by this time we are well on the way to regarding the situation as one in which a spouse has the election of treating the marriage as valid or null. The doctrine that, quite apart from the wishes of the spouses, the church had an interest in annulling invalid unions was well known in mediaeval times, and as late as 1816 we find churchwardens taking proceedings to annul an incestuous marriage.[31] In 1790, Sir William Scott (Lord Stowell) had indicated that it was in the public interest that the real character of doubtful marriages should be cleared up and that every person interested could apply for a decree of nullity,[32] but from the beginning of the nineteenth century the courts began to scrutinise the interest of the petitioner with close attention. In 1804, in *Turner* v. *Meyers*[33] the court refused to allow a father to bring proceedings for annulling his son's marriage on the ground of insanity, saying that he lacked any interest, and the cases where strangers had obtained decrees on the ground of consanguinity or affinity were distinguished as cases

[27] Brooke, Abr. Bastardy 9 citing Y.B. 11 Hen. IV., f 78; *Hinks* v. *Harris* (1693), 4 Mod. 182. The reasoning is fallacious. Death dissolves a subsisting marriage: the divorce here spoken of is not a dissolution of a subsisting marriage.

[28] Brooke, Abr. Bastardy 44.

[29] Y.B. 39 Ed. III, f. 31; *Rennington* v. *Cole* (supra).

[30] *Hinks* v. *Harris* (1693), Carth., 271. Prohibition granted to prevent the church court from pronouncing a decree of nullity after the death of the wife "but that the Spiritual Court might proceed against (the husband) *pro salute animae* to punish him for the incest, but they should not make the marriage void, so as to bastardise the issue, for that was against law." An excellent justification for the rule, which may have been appreciated though never expressed, is that questions of status cannot remain unsettled forever. A *de facto* marriage must be accepted at its face value sooner or later, and what better moment could be chosen than the moment when the marriage ceases to be a present fact and becomes past history. Another possibility is that the courts were confusing themselves with the rule of canon law that a man and woman who lived together until the death of one of them were presumed to be married.

[31] *Blackmore and Thorpe* v. *Brider* (1816), 2 Phill. 359.

[32] *Pertreis* v. *Tondear* (falsely called *Pertreis*) (1790), 1 Hagg. Con. 136.

[33] 1 Hagg. Con. 414 note.

where there was a public scandal to be abated.[34] A few years later petitioners in an affinity case were anxious to prove a pecuniary interest,[35] and in 1835 the court very hesitatingly pronounced a decree of nullity on the ground of affinity in a case brought by the wife's relations without other interest.[36] Finally in 1837 the Privy Council in an affinity case struggled hard to find a pecuniary interest in the woman's father and eventually found it in his potential liability to maintain his possibly pauper grandchildren.[37] But by that time the Marriage Act, 1835, had put it beyond doubt that marriages which were irregular on the ground of consanguinity or affinity were void, and thereafter the only voidable marriage was the marriage where one party was physically incapable, and as such a fact could rarely be known to strangers the spectacle of a nullity suit not promoted by someone other than a spouse virtually disappeared from the courts.

Coke's contribution to the misunderstanding came in his report of *Bury's Case*,[38] a protracted piece of litigation which spread itself over forty years of the reign of Elizabeth. John Bury married Wilmot. Three years later Wilmot obtained a decree of nullity on the ground of her husband's impotence. John then married Phillipa and Wilmot married a man named Cary. As each of these unions was blessed with children, awkward questions about the validity of the decree of nullity were asked. The point was first mooted in a case testing the validity of the Wilmot-Cary match, and twenty-seven years later it was again considered in a case testing the legitimacy of a child of the John Bury-Phillipa match. This second case was argued in the Common Pleas and affirmed in the King's Bench. On all three occasions the court held that the second marriage must be sustained as long as the decree of nullity remained unreversed. Now see what Coke had to say about the matter: 'Then admitting the second marriage was voidable, yet it remains a marriage until dissolved; and by consequence the issue, which is had during the coverture, if no divorce be in the life of the parties, is lawful.'[39] The word 'voidable' is here used in a peculiar sense. Obviously the second marriage must be accounted valid as long as the decree of nullity stood, but it was always liable to be declared invalid by the decree of nullity being vacated.[40] In that

[34] This was probably a subconscious echo of the rule of canon law settled in the thirteenth century which regulated the bringing of the *accusatio*. If the continued cohabitation of the parties would constitute a sin then the *accusatio* was an *actio popularis*; if not, only the spouses could bring the *accusatio*. Esmein, Le mariage en droit canonique, i 405.

[35] *Faremouth* v. *Watson* (1811), 1 Phill. 355.

[36] *Chick* v. *Ramsdale* (1835), 1 Curt., 34.

[37] *Sherwood* v. *Ray* (1837), 1 Moo. P.C. 353.

[38] Reported in various aspects and under various names at Dyer 178 b; 2 Leon. 169; Moore 225; 1 And. 185; 5 Co. Rep. 98 b.

[39] 5 Co. Rep. 98 b.

[40] The canonists' view was that the decree must be annulled because the church was deceived in its judgment, as subsequent events had proved. Although this doctrine could hardly survive the recognition of impotency *quoad hanc* at the beginning of the seventeenth century it was repeated in *Welde* (otherwise *Aston*) v. *Welde* (1730) 2 Lee 578, but was rejected by Dr. Lushington in *A*. v. *B*. (1853), 1 Spinks 12.

sense it was voidable, i.e. likely to be declared invalid. But once the decree is vacated it is apparent that the second marriage is not and never was a marriage. Indeed, it is the type of marriage universally agreed to be void—a marriage where one party is already married—and Coke was wrong in assuming that the decree could only be vacated in the lifetime of the parties. He had imported into this abnormal case the rule which had come to be applicable to the normal invalid marriage.[41] Worse still, he had given currency to the view that all annullable marriages were voidable, that is, valid until duly annulled in the lifetime of the parties.

Holt's blunder is to be found in *Pride* v. *Earl of Bath*[42] in 1694. In an ejectment the plaintiff attacked the legitimacy of the defendant's predecessor in title on the ground that he was begotten of a marriage where the wife was already married to another. The defendant objected that as there had been no decree of nullity in the lifetime of the parties the issue could not be bastardised in this way. Holt[43] completely misunderstood the defendant's argument and thought that the defendant was invoking the rule of *bastard eigne* and *mulier puisne*, the rule which says that if a married couple have had a bastard before marriage and the bastard enters on the father's death and dies seised and his issue enter after him, then the legitimate issue is barred.[44] Holt therefore held that the rule against bastardising after the death of the spouses only applied to this case of *bastard eigne* and *mulier puisne*. This is sheer nonsense. The rule of *bastard eigne* is not a rule against bastardising, but a rule which recognises that in peculiar circumstances the title derived through a bastard is good. Secondly, as we have seen the rule against bastardising after the death of the spouses did apply to other cases, and did not in any sense apply to the case of the *bastard eigne*.[45] Perhaps Holt felt qualms about his reasoning, for according to the reports in Levinz and Holt he added that if the plaintiff's evidence was to be credited, the marriage was null and void. Though the word 'voidable' was not used Holt was obviously drawing a distinction between void and voidable marriages.[46]

And so, backed by the authority of Coke and Holt, the terms

[41] In putting all the blame on Coke we do not overlook that in Moore's Reports at 228 we are told that the Common Pleas had held that Bury's son was not bastard because the decree was not annulled in the lifetime of the parties. But Moore's Reports were not published until fifty years after Coke's Reports and are not of great merit.

[42] 1 Salk. 120; 3 Lev. 410; Holt 286.

[43] Holt, C.J., and Eyre, J., sat alone to constitute the court, and we may be sure that Holt dominated the proceedings.

[44] P. and M. ii, 382.

[45] Coke makes it clear (Co. Litt. 244a) that the rule, by its very definition, required the *mulier* to attack the title of the bastard after the death of the father but before the issue of the bastard became seised.

[46] This was not quite the first occasion on which this dichotomy was hinted at. In *Riddlesden* v. *Wogan* (1600), Cro. Eliz. 858, the court had said of a marriage annulled on the ground that the husband was already married, "for this divorce is but declaratory, because the marriage was merely void, and therefore there needed not any such sentence of divorce; for it was void *ab initio*, and she always sole."

'void' and 'voidable' as applied to marriages passed into common use, with the implication that void marriages were so utterly void that they needed no decree to be pronounced, while voidable marriages could only be set aside by an ecclesiastical court. Those who relied on this distinction felt it necessary to offer some explanation of the fact that though the form of decree is identical in each case, in one case the decree is an unnecessary luxury and in the other an indispensable condition to remarriage. The explanation offered[47] was that a marriage invalid on a civil ground is void and needs no decree, whereas a marriage invalid only on a canonical ground is voidable and needs a decree. This explanation is patently false since it supposes, to take one example, that a bigamous marriage was only voidable before the Statute of Bigamy, 1603. Such a marriage was void by canon law, and because it was void by canon law it was void by the law of England.

Two other doctrines which assisted in encouraging the notion of the voidable marriage were the doctrine of insincerity and the particular variety of that doctrine which we can call the *Tanquam Soror* doctrine.

The doctrine of insincerity is applied when a petitioner for a decree of nullity on the grounds of physical incapacity is told that his or her conduct shows motives which are not bona fide. It is said that decrees of nullity in cases of this kind are a remedy for those who have suffered an injury, and where there is no immediate sense of injury there ought not to be a remedy. The evidence of insincerity on which the court most frequently bases its refusal to grant a decree is lapse of time between the discovery of the impediment and the presenting of the petition.[48] To-day the doctrine is highly rationalised, but let us see how it began. In the earlier cases the court takes the view, not that the petitioner's insincerity bars him from a discretionary remedy, but that it debars him from any assistance from the court in establishing his right. Cases of physical incapacity involve intimate matters, including a corporal inspection by officers of the court, and the court will not in unmeritorious cases subject a woman to proofs which are 'of an offensive nature'[49] or 'palpably against the modesty of the sex.'[50] Later we find the court saying that it will not aid a tardy petitioner because lapse of time means that evidence of a former state of affairs is hard to get and harder to rebut, though if clear evidence can be produced the petitioner will get his decree.[51] The first judge to suggest that insincerity was a discretionary bar to relief to which the petitioner was otherwise entitled was Dr. Lushington in

[47] Blackstone, Comm. i 434. See also Sir John Nicholl in *Elliott* v. *Gurr* (1812), 2 Phill. 16 at 19.

[48] A direct contradiction of the maxim of the canonists: *Tractu temporis non firmatur matrimonium nullum.*

[49] *Briggs* v. *Morgan* (1820), 2 Hagg. Con. 324 at 331.

[50] *Guest* v. *Shipley* (falsely called *Guest*) (1820), 2 Hagg. Con. 321.

[51] *Castleden* v. *Castleden* (1861), 9 H.L.C. 187. "If lapse of time is not a bar (I do not say that it is an absolute bar), at all events we must require after such lapse of time the clearest, strictest, and most unequivocal evidence of the facts necessary to support a petition." (Lord Campbell.)

B. v. *B.*[52] He said that it was 'a received maxim in (matrimonial) cases, that the party seeking relief, however well founded his ground of complaint may be against his consort, must show that, by his own conduct, by his own sense of injury, and his own vigilance, he is justly entitled to relief from the Court.' Such a doctrine was certainly known in relation to petitions for divorce *a mensa et toro* on grounds of adultery, but Dr. Lushington gave no warrant for applying it to cases of nullity. By 1863 the doctrine of insincerity had arrived in its modern form: there is a presumption that a long delayed petition is not bona fide.[53] And it only needed a case to come before a Chancellor with a Chancery upbringing for the doctrine to be squarely based on the principles of equity.[54]

The *Tanquam Soror* doctrine is merely a special application of the doctrine of insincerity. The court takes the view that a man who marries a woman of advanced age must have expected to forgo the pleasures of the marriage bed and must be content to live with his wife *tanquam soror*.[55] He therefore cannot complain when his wife turns out to be incapable of intercourse. Especially is this so if the husband is also well on in years, and his passions, to use Lord Stowell's words, 'no longer in a state of unsubdued provocation.' In such a case he must be left to 'just reflection and more placid gratification.'[56] The marriage of the aged had always been a pretty problem for the canonists and civilians. In principle it seemed that a union in which the main purpose of matrimony was no longer possible of fulfilment could be no marriage: on the other hand there was the scriptural precedent of St. Joseph and the Blessed Virgin for a marriage '*propter solam societatem et animorum conjunctionem*.' Opinion therefore varied, some taking the view that while the marriage of aged men was permissible the marriage of aged women was not, while others were prepared to compromise in regarding such marriages as valid but anomalous.[57]

The *Tanquam Soror* doctrine has been extended to three other situations. One is where a man has married a woman knowing of her incapacity. As he knew the facts he must be taken to have intended a '*conjunctionem animorum*.' The second is where a man seeks a decree of nullity on the allegation of his own impotence. In *Norton* v. *Seton* (falsely called *Norton*)[58] where the petitioner pleaded his own

[52] (1854), 1 Spinks 248 at 259

[53] *E.* v. *T.* (falsely called *E.*) (1863), 3 Sw. and Tr. 312.

[54] Lord Selborne in *G.* v. *M.* (1885), 10 App. Cas. 171 at 186. "The party has, with a knowledge of the facts and of the law . . . taken advantage and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them . . . to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and I may say, of general jurisprudence."

[55] There does not appear to be a *Tanquam Frater* doctrine. In *Nash* (otherwise *Lister*) v. *Nash*, [1940] P. 60, a woman of 34 who had married a man of 73 obtained a decree of nullity on the ground of the man's incapacity.

[56] *Briggs* v. *Morgan* (1820), 3 Phill. 325 at 331.

[57] Pufendorf, *De Jure Naturae et Gentium*, Bk. VI, c. 1, thought that marriages between aged people were "honorary": the title was accorded but performance was not expected.

[58] (1819), 3 Phill. 147.

impotence a decree was refused, partly on the ground that the suit was novel, and partly because the petitioner could not take advantage of his own wrong, as he must have known of his condition before marriage.[59] The third case is where a party married to one who is physically incapable has accepted the situation. In *A* v. *B*[60] Lord Penzance justified the court's refusal to decree nullity after the death of the parties, saying: 'If the parties themselves in a case of impotency are content with the *consortium vitae*, and prefer to maintain the bond of matrimony intact, would it not be almost intolerable that a third person should have the right to insist upon an inquiry into the nature of their cohabitation.'

We may now see what had happened. The fact that a marriage could only be attacked in the lifetime of the parties and, generally speaking, only in proceedings brought by a party, gave colour to the view that these invalid marriages were voidable. In the case of marriages within the prohibited degrees the result was disastrous. If these marriages had been truly voidable the result would not have been disastrous, for such marriages would have been valid for all purposes except in so far as opposed by a counteractive right vested in one or both of the parties, and accordingly the issue would have been legitimate. But because what was really a void marriage was treated in some respects as if it were voidable the status of the issue remained a matter of doubt for years, and accordingly Parliament was compelled to intervene with the Marriage Act, 1835, and it was laid down without doubt that marriages within the prohibited degrees were void. Unfortunately in the preamble to that Act a benediction was given to the view that such marriages were previously voidable,[61] and this provided an added reason for supposing that marriages invalid on account of physical incapacity were also voidable. On top of this came the doctrines of insincerity and *Tanquam Soror*, and any lawyer had ample justification for supposing that 'voidable' was the appropriate term.

The term 'voidable' had certainly been regularly used, at least since Blackstone's time, and Sir John Nichol once said that the difference between void and voidable marriages was 'so clear that no person who ever looked into any elementary book on the subject is ignorant of it.'[62] But Dr. Lushington, who was a better civilian than Sir John

[59] The decision was doubted by Dr. Lushington in *Miles* v. *Chilton* (falsely called *Miles*) (1849) 1 Rob. Ecc. 684. The suggestion of novelty is ever the refuge of timorous judges, and the other ground ignores the fact that in these cases marriages are annulled on the ground of the absence of a fundamental physical fact, and state of mind has nothing to do with the matter. However, it must be admitted that the decision accords with the old canon law practice which refused spouses to plead their own impotence on the ground that the opportunities of simulating impotence were considered too great.

[60] (1868), L.R. 1 P. and D. 559 at 563.

[61] "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto, etc."

[62] *Elliott* v. *Gurr* (1812), 2 Phill. 16 at 19. Sir John Nichol was, however, under the impression that in annulling a voidable marriage he was "putting asunder those who are joined together." (*Ibid.*)

Nichol, was unhappy about the term,[63] and other judges have found the matter very perplexing. Some of the more modern dicta are quite irreconcilable: at one time we find it said that the marriage is clearly good until a spouse elects to annul it;[64] at other times it is said to be so clearly void *ab initio* that intercourse with a stranger is no adultery, and a child born of such intercourse can be legitimated *per subsequens matrimonium*.[65] On the whole recent dicta emphasise the utter nullity of the voidable marriage.[66]

We can sum up the contentions so far made by saying that these voidable marriages are, as the decree indicates, really void *ab initio*; that as there never was any marriage the parties were never man and wife and the issue is bastard; that the rule that a decree of nullity cannot be pronounced *post mortem*, which was the first cause of the belief that such marriages were voidable, may have been justified at a time when the king's courts had to warn the church courts from meddling in matters of inheritance, but that it worked inconvenience, as can be seen from the necessity for the Marriage Act, 1835, and its continuance to-day is unnecessary; and that the doctrines of insincerity and *Tanquam Soror*, which give added colour to the notion that these marriages are voidable, rest on doubtful foundations and mistake the true nature of the vitiating cause in these cases.

If these contentions be accepted it follows that the decree of nullity in cases of voidable marriages is unnecessary, and that the parties are free, without decree obtained, to marry elsewhere. This proposition runs counter to every textbook which adverts to the point, but strangely enough there appears no reported case involving such facts. Laymen make many rash assumptions about the law and one would have expected that the courts would have to unravel the matrimonial relations of at least one man who thought that his marriage to a wife incapable of sexual intercourse was so much a nullity that he could marry again forthwith. If, therefore, we disregard the *communis opinio* of the textbooks we can consider the point as one which awaits definite decision.

It further follows from the above contentions that a party to such a voidable marriage who marries again without decree obtained does not commit the felony of bigamy. Again we fly in the face of the textbooks, but when we go beyond the textbooks to examine the authorities

[63] "It is a mistake to assert that Ecclesiastical Courts annul marriages in cases like the present, for these marriages are in themselves, *ab initio*, void." *B.* v. *B.* (1854), 1 Spinks 248 at 250. In *Ray* v. *Sherwood* (1836), 1 Curt. 173 at 188 he spoke of "the very unnatural distinction of voidable and void: for voidable is void *ab initio*."

[64] *Cavell* v. *Prince* (1866), 4 H. and C. 368. To an action on a covenant in consideration of marriage the defendant pleaded that the marriage was null and void for the plaintiff's impotence. The court held the plea bad because it did not allege that the wife had "elected to avoid the contract of marriage."

[65] *G.* v. *M.* (1885), L.R. 10 App. Cas. 171. An appeal from Scotland, but the law applicable appears to be the same.

[66] "There never was any valid marriage." Russell, J., in *In re Wombwell's Settlement*, [1922] 2 Ch. 298 at 305. "Not only are they not now married, but they never were." Kekewich, J., in *In re Garrett* (1905) 74 L.J. (Ch.) 570 at 572.

we find them very sparse. We naturally turn first to 'Archbold,' and though the latest edition states definitely that a first marriage voidable for impotence will support a conviction for bigamy,[67] the only authority cited is a dictum of Warren, J. in the Irish case of *B* (otherwise *A*) v. *B*.[68] It may seem surprising that 'Archbold' has to go to the dictum of an Irish judge to support what is supposed to be a settled rule of law. There are English dicta which may have been overlooked,[69] but the surprising fact remains that this elementary proposition lacks direct authority. The only case in the reports which has raised the question of a voidable marriage as a defence to a charge of bigamy is the unsatisfactory case of *R* v. *Jacobs*.[70] In that case the prisoner pleaded that his first marriage was void by an Irish Act of 9 Geo. II c. 11, which provided that the marriage of persons under twenty-one years of age without consent of parents or guardians 'should be absolutely null and void to all intents and purposes whatsoever.' The prisoner was convicted and the point reserved for the judges, who thought that notwithstanding these clear words there were other parts of the Act which showed that the marriage was really voidable, since proceedings to avoid it had to be taken within a year. But the report is meagre, and in so far as the case was argued at all it was argued on the footing that the marriage was void.

The first author for the view that a party to a voidable marriage who remarries without decree obtained commits a bigamy was Coke. In his Third Institute[71] he comments on the words 'Being married' in the Statute of Bigamy, 1603, and says: 'This extendeth to a marriage *de facto*, or voidable by reason of a precontract, or of consanguinity, or of affinity, or the like: for it is a marriage in judgment of law until it be avoided.' Coke's opinion was accepted by Hale, Hawkins and East, and to this day no one seems to have been bold enough to deny it. Coke gives no authority, but he was undoubtedly affected by the terms in which the Statute of Bigamy was drawn, for it was provided that it should not extend 'to any person or persons where the former marriage hath been or hereafter shall be by sentence in the ecclesiastical court declared to be void and of no effect.' The fact that such persons were exempted from the operation of the Statute in certain circumstances is no proof that without the exception or in other circumstances they would be liable to be convicted. And in any event the provisoes to the Statute of Bigamy were quite capricious in their operation.[72]

[67] 31st ed. 1312.

[68] (1891), 27 L.R., Ir. 587 at 608. This was a case where the wife left her husband alleging that he was impotent and married another man. Later she sought a decree of nullity from her first husband but it was refused for lack of proof. Warren, J., said: "Suppose a prosecution for bigamy. . . . The impotence of the first husband would not have been a defence."

[69] Bramwell, B., in *H.* v. *C.* (1865), 1 Sw. and Tr. 605 at 618; Goddard, L.J., in *In re Eaves*, [1940] Ch. 109 at 119.

[70] (1826), 1 Moo.C.C. 140.

[71] Co. Inst. iii 88.

[72] The effect of the provisoes was that a decree *a mensa et toro*, which patently left the parties married, was a bar to a prosecution for bigamy, and Coke thought that the mere pronouncing of a decree of nullity, even though that decree was being appealed from, was a bar. Co. Inst. iii 89.

The question for determination is not whether a prisoner can pray in aid of the provisoes, but whether having gone through a ceremony of marriage which the law is prepared to pronounce null and void constitutes 'being married.'[73] And if it be thought that we are too rash in tilting at a proposition which is endorsed by Coke, Hale, Hawkins and East, and repeated in every modern textbook, it should be remembered that a few years ago we witnessed the House of Lords demolishing a proposition which had the support of every author of a book on criminal law since the time of Foster.[74]

Support for the view set forth above can be found in a recent decision of Andrews, L.C.J., in the High Court in Northern Ireland in *Mason* v. *Mason* (otherwise *Pennington*).[75] In this case the respondent had married *X* in 1932, and two year later obtained a decree of nullity on the ground of *X*'s incapacity. The decree nisi of nullity was granted on 10th July, 1934. The respondent, who had presumably heard that a decree nisi is something which is followed six months later by a decree absolute, waited for six months and than married the petitioner on 10th January, 1935. In fact the decree absolute was not pronounced until 21st January, 1935. The petitioner now petitioned for nullity on the ground that the marriage was bigamous. Andrews, L.C.J., held that 'by the retrospective effect of the decree absolute, the respondent must in my opinion be regarded as being an unmarried man on 10th January, 1935, when he married the petitioner.' That was all that was necessary to consider in order to decide the case, but it will be realised that the decree absolute is not merely retrospective to the date of the decree nisi but, if such a decree be retrospective rather than declaratory, is retrospective to the date of the supposed marriage. If the respondent was an unmarried man on 10th January, 1935, was he not also an unmarried man on 9th July, 1934? If so, could he not have abandoned his nullity proceedings and married the petitioner forthwith?

In support of his conclusion Andrews, L.C.J., referred to two matters which bear on this question. In the first place the Lord Chief Justice drew attention to the form of the proviso to sect. 57 of the Offences Against the Person Act, 1861, which replaces the Statute of Bigamy, and which declares that the section shall not extend to a person 'who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.' He noted that the words 'at the time of such second marriage' govern only the first limb of the proviso, and concluded that an arraigned bigamist who alleges a dissolution of his first marriage must show a decree absolute of dissolution dated previous to the second marriage, whereas the arraigned bigamist who alleges a decree of nullity proves his defence if he is able to produce

[73] The words of the Statute are "being married" and not "having gone through a ceremony of marriage."

[74] *Woolmington's Case*, [1935] A.C. 462.

[75] [1944] N.I. 134.

a decree of nullity by the time of the trial. It is true that the inference from this is that the arraigned bigamist who cannot produce a decree of nullity by the time of the trial has no defence under this part of the proviso, but as we have already noted, the question whether a prisoner has a defence under the proviso is entirely distinct from the more important question whether he is a person 'being married' under the main part of the section.

The other matter referred to by Andrews, L.C.J., was the decision of the Irish Court of Appeal in *P.* v. *P.*[76] The plaintiff in contemplation of her intending marriage to the defendant had paid to him the sum of £475 as her dowry. Nearly six years later she petitioned for nullity on the ground of the defendant's impotence, but before her petition was heard she had issued a writ for the return of her dowry. The reason for the haste in issuing the writ was fear of the Statute of Limitations running against her. On the other hand it was agreed that her rights in this action must be determined at the date of the writ, and she could only succeed by showing that at that date she was an unmarried woman. The Court of Appeal, affirming the King's Bench Division, held that she was entitled to succeed. All the judgments in the case endorse the view that such a marriage is void *ab initio*. It is true that by the time the action for the return of the dowry came to be tried the plaintiff had obtained her decree of nullity, but the judges laid their emphasis on the declaratory nature of the decree rather than on any retroactive effect. Yet the precise point we are after still eluded decision, and it is this. If Mrs. *P* had, on the day she issued her writ, married another man should we have been treated to the spectacle of the King's Bench Division on its matrimonial[77] or criminal side holding her to be a bigamist, while on the civil side the same court held her to be a hitherto unmarried woman?

F. H. Newark.

[76] [1916] 2 I.R. 400.

[77] Matrimonial jurisdiction in Ireland was, and to-day in Northern Ireland is, vested in the King's Bench Division.

THE DIFFICULTY OF ENFORCING RIGHTS UNDER A BRITISH PATENT AGAINST AN INFRINGER*

THE grant of a British patent confers on the patentee the sole right "to make, use, exercise or vend" the invention in the United Kingdom. At law the patentee is entitled to enforce this right by an action brought in the Courts against any person who infringes the patent. In practice, however, the legal protection afforded to the patentee is often inadequate and a patentee who starts an action for infringement finds himself faced with a difficult, hazardous and costly undertaking. The purpose of this article is to describe some of the difficulties confronting him.

Proving Infringement

The first difficult task confronting a patentee who has instituted an action for infringement of his patent is to prove the infringement. Even if the defendant is in fact using the invention described in the patent specification the patentee will often find it impossible to prove this fact. For example, if the patentee suspects that an infringing machine or an infringing process is being used in a factory owned by the defendant he may be unable to secure the necessary evidence to prove this because the defendant will refuse him access to the factory. If the patentee can make out a *prima facie* case of infringement the Court may make an "order for inspection" authorising an expert representing the plaintiff to visit the factory of the defendant and to report on any facts relevant to the question of infringement, while treating as confidential any other manufacturing secrets of the defendant which the expert may have discovered in the course of the inspection. There are, however, cases where the patentee will find it impossible to make out a *prima facie* case and will, therefore, be unable to obtain an order for inspection.

Even in a case where the facts are undisputed or where the patentee has the necessary evidence to prove that the defendant is using the invention described in the specification, he will often find himself involved in legal difficulties when he tries to show that these facts constitute an infringement of the claim of the patent. These legal difficulties concern the interpretation and the ambit of the claim. It is not sufficient for the patentee to show that the infringer is using the invention made by the inventor and disclosed in the patent specification. In order to discharge the onus of proof of infringement resting upon him the patentee must prove that the article made or the process used by the defendant is covered strictly by the wording of the claim of the patent. If the claim covers only a narrow field the rights of the

* This article forms part of a book on *Inventions, Patents, and Monopoly*, by the same author, which will be published early next year by Messrs. Stevens & Sons, Ltd.

patentee are limited to this narrow field although the inventor may have made a much broader invention and may have disclosed it fully in the specification. For example, the claim of a patent owned by Nobel's Explosives Company covered a mixture containing "soluble nitrocellulose"; use of the same mixture containing "insoluble nitrocellulose" was held not to constitute an infringement of the patent although it achieved exactly the same purpose.[1] In another case an inventor had found a new method of efficiently eliminating the "ground noise" in sound films; the claim covered a motion of the light beam "transverse" to the film; use of the same method in an apparatus in which the light beam moved "vertically" to the film was held not to constitute an infringement although it achieved exactly the same result.[2]

In the past the Courts were sometimes prepared to give protection to the patentee even though the article made or the process used by the defendant were not covered strictly by the wording of the claim of the patent, provided the defendant had taken "the pith and marrow of the invention" or had merely substituted a "mechanical equivalent" for a device shown in the patent. To-day, however, the Courts tend to give a much narrower interpretation to the claim and to tie down the patentee strictly to every individual word used in the claim. This tendency is illustrated by a passage in a recent judgment by the Court of Appeal delivered by the Master of the Rolls who stated: The law does not say to the inventor: "You are entitled to protection for your invention"; it merely says: "You are entitled to protect yourself."[3]

After the event, at the time when the infringement suit is being fought, it is easy to advise the patentee that he should have worded his claim differently when he filed it with the Patent Office. In practice however, at the time when the claim is drafted, it is usually impossible for the inventor, even if he is advised by the most experienced patent agent, to foresee every possible mode of using the invention that may be contrived by an infringer many years later. Moreover, the Patents Rules provide that the claim must be "succinct"; a patent agent is thus called upon to compress into a few lines the gist of a complicated technical device or chemical process, which in normal engineering or chemical practice will fill a report of many pages. It is true that a patent specification may also cover several pages; however, while equal attention is given to every part of a report submitted by an engineer or a chemist, the Courts have in recent years tended to pay little attention to the contents of the specification and to judge the rights of the patentee solely by looking at the individual words in the claim. Finally a patent agent must bear in mind that if, in order to cover every conceivable mode of infringement, he drafts a very broad claim he runs the risk of including in the claim something which, not being new on the application or priority date, invalidates the patent.

[1] 11 Reports on Patent Cases, 1894, p. 115.
[2] 56 Reports on Patent Cases, 1939, p. 167.
[3] 53 Reports on Patent Cases, 1936, p. 205.

The consequences of an inappropriate word used in a claim would be less serious for the patentee if the Courts were prepared to give effect to a clause which, for centuries, has been contained in the document constituting the grant of a British patent. This clause provides that the "letters patent shall be construed in the most beneficial sense for the advantage of the said patentee."[4] The Courts to-day, however, take the attitude that there is no special rule of benevolent construction of a patent. On the contrary, the Judges have considered it their duty to "scan a patent specification with the closeness which is required in the case of any instrument conferring a monopoly."[5] Moreover, in the past the Courts were usually prepared to hold a claim infringed if a defendant had merely substituted an ordinary mechanical equivalent for a part referred to in the claim, as for example a spring for a weight. The present tendency is, however, to restrict the scope of the patent to the exact part referred to in the claim. This tendency is illustrated by the following passage contained in a judgment rendered in 1932 and quoted with approval by the Court of Appeal in 1936: "At the present time, when the claims at the end of a specification commonly run into double figures, there is in truth very little scope for the operation of a doctrine of mechanical equivalency."[5a]

It is, of course, the duty of the Courts to restrain attempts of a patentee to extend his monopoly beyond the claim he has made in the patent and to protect every honest manufacturer who steers clear of the patented invention. However, the present excessively strict method of interpreting the claim of a patent frequently favours not only the honest manufacturer but also the "pirate" who sails as close to the invention as the words of the claim will possibly permit.

The American practice on the interpretation of claims varies. There are a number of decisions by the US Supreme Court favouring a liberal interpretation, but in another case the US Supreme Court has said that the claim of a patent is not "a nose of wax which may be turned and twisted in any direction" suiting the patentee[5b]. Furthermore under US law each claim must comprise all essential elements of an operative combination including any old elements. On balance, therefore, on the question of proving infringement the difficulties facing a US patentee are as great as those facing a British patentee.

The French and the pre-Nazi German systems of interpretation of claims err on the other side. Under French law a patent specification ends with a "résumé" but the scope of the protection afforded to a French patentee depends on the contents of the specification as a whole and the résumé is of very little significance. German patents end with a claim but the protection given to a German patentee by the Courts depends on "the state of the art" on the priority date of

[4] Patents Rules, 1939, Third Schedule.
[5] 39 Reports of Patent Cases, 1922, p. 67.
[5a] 49 Reports of Patent Cases, 1932, p. 175 and 53 R.P.C., 1936, p. 189.
[5b] See Rivise and Caesar, *Patentability and Validity*, p. 438.

the patent and not on the wording of the claim. Under the French and the German systems it is therefore very difficult for a third party to ascertain whether or not an article he intends to make or sell infringes a particular patent.

Meeting an Attack against the Validity of the Patent

The second difficult task confronting a patentee who has instituted an action for infringement of his patent is to meet an attack against the validity of the patent. The Patents and Designs Act, 1907 to 1942, lists 17 grounds upon which the validity of a patent may be challenged by a defendant in an infringement action.[6] These grounds can be summarised as follows:—

(*a*) prior grant
(*b*) application for the patent not made by the true and first inventor
(*c*) patent obtained in fraud of the rights of the inventor
(*d*) lack of "manner of manufacture"
(*e*) lack of novelty
(*f*) lack of an inventive step
(*g*) lack of utility
(*h*) insufficient description of the invention
(*i*) insufficient ascertainment of the scope of the monopoly
(*j*) failure to disclose the best method of performing the invention known to the applicant
(*k*) obtaining the patent on a false representation
(*l*) "disconformity" between the complete specification and the provisional or the basic foreign specification
(*m*) illegality of the exercise of the invention
(*n*) failure to comply with conditions contained in the patent
(*o*) secret working of the invention on a commercial scale before the priority date
(*p*) in the case of chemical inventions or inventions relating to food or medicine claiming a monopoly for a substance as such and not only for a process of producing it
(*q*) any other ground upon which a patent could be revoked before 1884.

No other Patent Act in the world provides such a formidable array of grounds upon which a defendant in an infringement action can challenge the validity of a patent.

The most important of these grounds is lack of novelty. A patent is granted to an inventor as a reward for making and publishing a "new" invention. If in fact the invention is not new the consideration for the grant falls to the ground and the patentee is not entitled to a monopoly. This principle in itself is just and equitable; the manner in which it is at present applied in practice does, however, in certain

[6] Patent Act, Sect. 25 (2 and 3).

cases result in hardship to the patentee. Under British law an invention is not new if before the priority date it was known to the public in this country by prior use or by prior documentary publication. There are cases where a patentee has a hard struggle to refute fabricated evidence regarding prior use, but on the question of novelty his main difficulties are concerned with prior documentary publications. Any kind of document published in this country before the priority date will invalidate a British patent. Even a typewritten or longhand document published before the priority date may render a patent invalid and it makes no difference whether the publication is in English or in a foreign language.

Furthermore—except in the case of patent specifications and abridgements thereof—it is immaterial how old the prior publication is. For example, an article in an Italian journal more than 100 years old of which there is only one copy in a public library in this country may affect the validity of a British patent. Even a publication of the invention by the inventor himself before the priority date will render a British patent completely invalid. A prior publication will invalidate a patent even though it was unknown to the inventor and to the examiner of the Patent Office at the time of the application as well as to the defendant at the time when he started the manufacture of the infringing article. If the defendant and his advisers by a diligent search undertaken after the institution of the infringement action can unearth some prior publication containing anything claimed in the plaintiff's patent the action will be dismissed; it will not help the plaintiff to prove that the defendant had gained the knowledge enabling him to produce the infringing article exclusively from the patent specification and not from the prior publication. Finally, if a claim contains partly new and partly old matter the entire claim will be invalid. If a patentee "opens his mouth too wide" by claiming partially old matter he will be punished by being deprived of all patent protection although part of the invention claimed by him was new on the date of the patent. Thus a prior publication will invalidate a patent if it discloses any article claimed in the plaintiff's patent even though it does not disclose the infringing article actually made by the defendant. We take as an imaginary example a claim covering "a filament for an incandescent lamp made of tungsten or of tantalum," and assume that on the date of the patent the use of a tungsten filament was new but the use of a tantalum filament was old; the defendant has made a lamp containing a tungsten filament. In this case the patent would be held invalid because the claim included the use of tantalum which was not new, and the infringement action would be dismissed although the article actually made by the defendant, namely a lamp containing a tungsten filament, was new on the date of the patent.

Another ground which frequently causes difficulties for a patentee in an infringement action concerns the sufficiency of the description. One of the principal reasons for the granting of patents is to induce

inventors to disclose their inventions so that the technical knowledge of the country is enriched and members of the public are enabled to use the invention when the patent has expired. If the specification does not sufficiently and fairly describe the nature of the invention and the manner in which it is to be performed this object is not achieved. An inventor must not give people mechanical or chemical problems to solve and call them patent specifications. On principle it is, therefore, right that the patentee should be deprived of his monopoly if the patent specification suffers from an insufficiency. Here again, however, the excessive strictness with which the principle is applied by the Courts to-day frequently results in injustice to the inventor.

During the application stage, when the invention is still untried and may turn out to be a complete failure commercially, a patent agent can devote only a limited amount of time to each of the many specifications he has to draft; otherwise the costs of the application would become prohibitive not only for an independent inventor but even for a big firm. However, once the invention has proved to be one of the few which are a commercial success and once it is being used by the patentee and by the defendant, the defendant can well afford to employ a host of legal and technical experts to go through the specification with a fine tooth comb in order to find a flaw or defect in it. In the course of a diligent search lasting for weeks these experts will often succeed in detecting one or the other which escaped the notice of the inventor and his patent agent during the application stage. Every such flaw or defect will be held against the patentee in the infringement action and may lead to the patent being declared invalid. For example, if a patent specification sets forth twelve different methods of carrying out the invention of which eleven achieve the desired result in a perfect manner, while the twelfth method will not work, the entire patent will be held invalid. Another blatant example of the present "witch hunts for ambiguity" and the way in which patents covering new and useful inventions are held invalid owing to "linguistic errors" is given by Mr. H. E. Potts in Mod. L. R., 1944, Vol. VII, p. 230.

Alleged lack of novelty and alleged insufficiency of the description are the two most frequent attacks against the validity of the patent which the patentee has to meet in practice. The other grounds of invalidity listed above may also cause difficulties to a patentee in an infringement action but lack of space makes it impossible to deal with them in this article.

Under the laws of South Africa, the USA and other countries only printed, and not handwritten or typed publications will affect the novelty of an invention. On the other hand under the laws of these countries publication anywhere in the world will be detrimental to novelty and not only—as under British law—publication within the country where the patent is granted.

Under the laws of the USA and Canada novelty is not affected by a publication which took place after the conception or discovery of

the invention by the applicant but not more than one year before the application was filed with the Patent Office, while under British law a publication which took place between the date of the conception or discovery and the date of the application renders the patent invalid.

Under German law the inclusion in the claim of matter which was not new on the date of the patent will not affect the validity of that part of the claim which covers new matter. Moreover, a publication emanating from the inventor himself made not more than six months before the application date will not invalidate a German patent.

Insufficiency of the description is a ground of invalidity in nearly every country, but in few countries are the requirements regarding sufficiency and correctness as stringent as in Great Britain. The Canadian Patent Act provides that if an omission or addition of a statement in a specification was an involuntary error the Court may treat the patent as valid.

Rigid Rules of Procedure

A third difficulty with which a patentee has to grapple in an infringement action are the rigid rules of procedure. These rules are contained in Order 53*a* of the Rules of the Supreme Court. Under these rules the plaintiff must deliver to the defendant "particulars of breaches" on which he intends to rely to prove infringement, i.e. particulars of the times, places, occasions and manner in which the defendant is alleged to have infringed the patent. If the defendant disputes the validity of the patent he must in turn deliver to the plaintiff "particulars of objections," i.e. particulars of the individual grounds of invalidity and of the documents and other evidence on which he intends to rely to prove the invalidity. Furthermore under Order 53*a*, rule 21*a*, as amended in 1936, the Court will give directions as to the mode of trial. It is now usual for the Court to direct the plaintiff to deliver to the defendant a preliminary statement signed by counsel setting forth the construction and interpretation which the plaintiff desires to give to the words of the claim and to every part or element of every claim alleged to be infringed. The defendant is directed to deliver to the plaintiff a preliminary statement signed by counsel specifying to what extent the defendant accepts the contentions of the plaintiff; if the defendant disputes the novelty of the patent the statement must also set forth the relevant parts or elements of the claim alleged to have been disclosed by the prior publications cited by the defendant. Furthermore it is usual for the Court to order each party to deliver to the other party a list of experiments on which it wishes to rely at the hearing and to demonstrate such experiments in the presence of the other party.

Under present practice each party is tied down strictly to every word in its preliminary statement; leave to amend the statement can usually be obtained before, but rarely, at the hearing. Moreover, at

the hearing a party is not allowed to rely on evidence, particularly on experiments, not referred to in the preliminary statement or not demonstrated beforehand to the other party. Consequently each party has to ensure that its preliminary statement is absolutely correct and complete and is forced to demonstrate to the other party every single experiment on which it might conceivably wish to rely, although ultimately many of the documents or experiments may turn out to be completely irrelevant. It is, of course, right that a party should not be allowed to spring surprises on the other party; it is necessary that each party should inform the other party regarding the facts, documents, experiments and contentions on which it intends to rely so that the other party knows the case it will have to meet at the hearing. However, the present excessively rigid application of the rules of procedure and the manner in which parties are tied down to every individual word in the preliminary statements cause much unnecessary trouble and expense to patentees. For example, in a recent case dealing with railway signals the preliminary statement of the plaintiff was drafted, amended and re-drafted sixteen times before it was brought into Court and the cost of preparing it is said to have been several thousand pounds.[7]

The rigidity of the rules of procedure and evidence experienced in litigation under a British patent is not confined to the patent law but is charactersitic of all litigation in British Courts. In most Continental countries a considerable amount of latitude is given to the Judge in patent cases as well as in all other cases, to regulate the procedure and, in his discretion, to accept or to reject evidence. Consequently the procedural difficulties confronting a Continental patentee are far smaller than in Great Britain. On the other hand in a number of Continental countries the procedure is so lax that it takes years to terminate a case, as in France, or that the hearing of the case tends to degenerate into written proceedings, as in Germany.

Costs

A fourth difficulty with which a patentee who wishes to enforce the rights under his patent in the Courts has to struggle is the cost of patent litigation. The most expensive patent action fought in recent years was probably the infringement action brought by the British Celanese Co. against Courtaulds; in this case, which started in 1931, and was decided by the House of Lords in 1935, the expenses of one party are stated[8] to have amounted to about £59,000. On the other hand there is a fairly recent case on record[9] where the costs of the patentee are said to have been only £172. Since the amount of costs varies greatly in each case it is impossible to give representative figures for the average cost of patent actions. Venturing a rough

[7] *Chartered Institute of Patent Agents*, Vol. 61 (1942–43), p. 36
[8] *The Times*, 8th March, 1935.
[9] *Chartered Institute of Patent Agents*, Vol. 55 (1936–37), p. 200.

guess we might estimate that in a simple case the costs of the patentee might run from £500 to £2,000 and in a complicated, but not especially difficult case, from £1,000 to £10,000. These figures include the fees paid to counsel, solicitors, patent agents and experts during the preparation of the trial and the hearing but not salaries paid to employees and similar expenses, although the amount of time devoted to the case by the patent departments and the engineers or chemists employed by the patentee may be very considerable. Moreover, the figures do not include the expenses of an appeal which would increase the cost by 50 per cent to 100 per cent.

Since the amount of the fees varies widely from case to case it is also impossible to give representative data for the individual items of the cost of a patent action.[10] Hazarding another rough guess we might state that in an action costing say £5,000 the individual items might be made up as follows:—

Counsel . .	£2,000
Solicitors .	900
Experts . .	1,100
Patent Agents .	500
Court Fees .	10
Various . .	490
	£5,000

Even if a patentee succeeds in winning an infringement action he will be able to recover from the defendant only a fraction of the costs actually incurred, since a considerable part of the expenses will not be allowed as "taxable" by the Taxing Master of the Court.

The exceedingly high cost of fighting a patent suit in Great Britain is again characteristic not only of patent litigation but of nearly all litigation carried on in the British Courts. The cost of patent litigation in the U.S.A. is as high or possibly even higher than in this country. On the Continent, on the other hand, litigation is very much cheaper and a case where a Continental patentee has to pay more than say £500 to enforce the rights under his patent is very rare.

Conclusion

It is often contended nowadays that a patent is an exceedingly dangerous weapon in the hands of a monopolist.[11] Safeguards to prevent the abuse of patent monopoly are, of course, necessary in certain cases, but the difficulties at present facing a patentee who wishes to enforce his rights under a British patent are so great that the patent has become a blunt weapon. Some of these difficulties are unavoidable since they are inherent in the nature of inventions and

[10] For some examples of actual costs see Ellis in *Chartered Institute of Patent Agents*, Vol. 37 (1918–19), p. 27, and Vol. 55 (1936–37), p. 250.

[11] See, for example, W. A. Lewis in Mod. L. R., 1943, p. 97.

patents; others, however, are due to defects in the patent law and the manner in which the patent law is at present being administered.

A Departmental Committee was appointed by the Board of Trade in April, 1944, to consider what changes are desirable in the Patents and Designs Acts and in the practice of the Patent Office and the Courts in relation to patents. The Committee has been requested to submit an interim report on the conduct of legal proceedings relating to patents and on provisions for preventing the abuse of patent monopoly. It can be expected that a number of the difficulties outlined above at present confronting a patentee who wishes to enforce his rights under a British patent will be removed when the recommendations of this Committee have been put into effect.

Some of the defects from which the British patent law is suffering are absent in certain foreign patent laws. In many other respects, however, the British patent law is more equitable than many of the foreign laws. For example few foreign laws provide for an "order for inspection," even when the patentee has made out a *prima facie* case of infringement. Moreover, under many foreign laws prior publication anywhere in the world—and not only as under British law, in the country where the patent is granted—invalidates the patent. Some foreign laws contain provisions which are manifestly unfair to the defendant; for example the Dutch and the German law provide that a patent cannot be held invalid after it has been in existence for more than five years, even though it would have been held invalid for lack of novelty or for other reasons if the proceedings had been started before the expiration of the five year period.

Finally a British patentee and a defendant in a British patent action have the great advantage of knowing that their case is being tried by a Judge who is absolutely independent and unbiased in every respect. This fact is taken for granted by British litigants, but certainly it is an advantage which is not enjoyed by parties involved in patent litigation in a considerable number of foreign countries.

PETER MEINHARDT.

LEGAL THEORY*

WHEN we speak of "legal theory" what do we comprise within that term? Firstly, it may be said to include the interpretation of the idea of law itself, and an explanation of the relation between law and the State. This branch of legal theory is a major part of the philosophy of politics. Secondly, legal theory is concerned with the relation between law and justice, law and religion, law and public policy, and all those other outside standards by means of which attempts are made to measure law. This branch of legal theory is closely connected with moral philosophy. Thirdly, legal theory includes the analysis of the basic concepts such as right, duty, legal person, etc., found in all systems of law. This branch of legal theory is more closely related to law as a practical science than are the first two, but nevertheless it may be said to be part of legal philosophy as a whole.

In his book *Legal Theory* Dr. Friedmann has set himself the two-fold task of attempting "firstly, to reduce every legal theory to its essential foundations; and these include the philosophical, political, and economic background," and "secondly, to demonstrate the vital significance of legal ideology for the actual working of the law." When we consider the vast field included under the term "legal theory" it is clear that the author in attempting to analyse the principal theories developed in more than 2000 years has undertaken a very considerable task, and it is therefore hardly surprising that he has not proved entirely successful. Nevertheless, he has managed in quite a remarkable way to give life to his presentation so that the reader never feels that he is being fed with only snippets of learning. Of particular value are the comments with which Dr. Friedmann follows his longer analysis of the different philosophies, for his criticisms are clear and to the point. Although the author disclaims any intention to add a specific legal theory of his own, his book is more than a summary of other men's ideas, for by criticizing them he develops his own relativist philosophy.

To cover all Greek and Roman legal philosophy, even in the barest outline, in less than ten pages is obviously an impossible task, so the author has concentrated almost entirely on ancient theories of natural law. As a result his treatment of Aristotle, in particular, is inadequate, and some of the most valuable parts of Aristotle's legal philosophy are omitted altogether. Thus no reference is made to his definition of law which emphasizes that law consists of the rules binding both on the magistrates and on the subjects of the State. It is this fact that the magistrates themselves are bound by the rules which distinguishes government by law from government by administrative discretion. Nor is Aristotle's definition of the State in the terms of its constitution, with his famous reference to the comic and tragic choruses, discussed by Dr. Friedmann, although it is a far greater and truer conception of the State than Hegel's confused (and confusing) idea to which he later devotes considerable space. Nor, strange to say, is any reference made to the Roman legalistic interpretation of the State as a *vinculum juris*, although in the sections on Stammler and Kelsen it is noted that in their view the State is nothing but a particular type of legal order. Dr. Friedmann implies that this is an important contribution to modern legal thought on their part, when, in

**Legal Theory*, by W. Friedmann, LL.M., Dr. Jur., 1944. Stevens & Sons, Ltd., London. Pp. XVI, 448.

fact, the idea is two thousand years old. Moreover, no reference is made to the fact that it was through Roman law that many of the Greek political ideas were transmitted to the modern world, or to the influence of such Roman concepts as imperium and dominium on international and national affairs.

The same over-emphasis on the Law of Nature can be found in the brief section on the legal theories of the Middle Ages. Feudalism can hardly be dismissed in a few lines, for we are beginning to realize that in many ways the feudal system was based on a truer conception of law than is the exaggerated idea of the nation-State. As Maitland has pointed out,[1] feudalism with its conception of the reciprocal rights and duties of King and tenants would have been impossible if the command theory of law had been accepted in the 13th century. Law as custom played as great a part as did law as reason in mediaeval legal thought: it is only necessary to refer to the title of Bracton's great work to realize this.

In considering the influence of the Law of Nature on English political and legal thought, Dr. Friedmann has, in large part, followed the line adopted by Sir Frederick Pollock in his essay on *The History of the Law of Nature*.[2] Sir Frederick suggested that in England natural law ideas were introduced under the guise of the reasonable man and of equity. Similarly Dr. Friedmann says[3] that "the actual moulding force of natural law ideas has probably been greater in English and, particularly, in American legal development than anywhere on the Continent." This, however, is hardly the sense in which the idea of the Law of Nature was conceived on the Continent, for in his admirable summary of David Hume, Dr. Friedmann himself says[4] that "the theory of natural law was based upon a conception of reason as a faculty inherent in all men and producing certain immutable laws." But the English "reasonable man" never purported to give us certain immutable laws; he was concerned with practical answers to practical problems. If we say that all attempts to reform the law along reasonable lines are a form of natural law thinking then every one must be an adherent of the law of nature school, because no one, unless he were insane, would wish to reform the law along unreasonable lines. Unless we restrict the idea of the Law of Nature, as Bentham did, to a code based on abstract *a priori* reasoning we must fail to understand why this doctrine has called forth such bitter criticism.

In his section on *Natural Law in American Jurispudence*, Dr. Friedmann says[5] that "at no period of legal history and in no other legal system has the law, and, through it, social life been moulded with greater effect by higher law principles based on a specific interpretation of natural justice than American Law." I have some doubt on this point, even though Dr. Friedmann can claim the support of Professor Haines[6] for his view. The function of the United States Supreme Court has been to interpret specific provisions in the Constitution, in particular the terms of the 14th Amendment which provides in part that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Such terms as liberty, property, and the equal protection of the laws are, of course,

[1] Pollock and Maitland, *History of English Law*, Vol. I, 181.
[2] *Essays in the Law.*
[3] P. 49.
[4] P. 46.
[5] P. 53
[6] *The Revival of Natural Law Concepts.*

general, and the Court has therefore had to define them, or, at any rate, to mark the limits of their content, but in doing so the judges have been more concerned with the doctrines of the common law than with any general principles. Abstract ideas of the rights of man have been rejected except in so far as they could be defined in the terms of common-law rights. Sir Edward Coke would, I believe, find himself more at home arguing before the Supreme Court than would Professor Stammler with his conception of a law of nature with a changing content.

From the Law of Nature Dr. Friedmann turns in Part III to German transcendental idealism. This is not an easy chapter to read, but it well repays the effort, for nowhere else in English literature have the legal theories of Kant, Fichte, and Hegel been so carefully analysed. In speaking of Kant, Dr. Friedmann says[7] that "it must be emphasized that Kant's legal philosophy is entirely a theory of what the law ought to be. . . . His is the legal philosophy of a philosopher, not of a lawyer." Thus when Kant defined law as "the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom" he was referring not to any system of law which actually exists, but to an ideal principle on which law ought to be based. The odd thing is that when Kant himself attempted to illustrate his theory by concrete illustrations he reached some queer results. To an even greater extent is this true of Hegel whose dialectic process enabled him to conclude that the object of punishment "is to restore the true will of the criminal, that is the will which is in accordance with the universal." Dr. Friedmann says[8] that "these extravagances are important mainly in so far as they keep awake a critical spirit in a reader who might well be overawed by minds so much greater than his own," but may it not be equally true to say that these extravagances cast some doubt on the validity of the philosophies from which they emanate? The mistrust which the English lawyer has sometimes felt for purely abstract legal philosophies may find some justification here.

The next chapter, entitled *Scientific Idealism*, deals with the theories of Stammler, del Vecchio, and Kelsen. The importance of Stammler's contribution to legal philosophy may not be affected by the fact that it seems to have led him to become a Nazi adherent nor that of del Vecchio because it seems to have induced him to become an apologist for Fascist ideals, but here again an English reader may entertain some doubts concerning the value of these vaguely expressed ideas. Thus when Dr. Friedmann, in speaking of del Vecchio, says:[9] "Sometimes, however, there is a distinctly Hegelian flavour in his argument, thus when he describes the circular life of law, which born of the spirit returns to the spirit through history," we feel that there is something to be said for the more precise terms of analytical jurisprudence. In this chapter Dr. Friedmann devotes twelve pages to Kelsen's legal philosophy: this seems to be slightly out of proportion when compared to the five pages devoted to Aristotle. On the other hand the four pages in which Radbruch's relativism are discussed might well have been expanded because as his works have not been translated into English this is the only place where the reader, unacquainted with the German language, can find a summary of his valuable contributions to modern juristic thought. Perhaps no

[7] P. 65.
[8] P. 79.
[9] P. 97.

other modern Continental legal philosophy is so akin to English thought, with its emphasis on the need for tolerance and the balancing of conflicting points of view.

In his chapter on *Analytical Positivism* Dr. Friedmann does Austin both more and less than justice. I think that he does him more than justice when he says[10] that "within state societies, the essential features of Austin's theory have established themselves beyond serious challenge. . . . It is only the rigid separation of law from the ideals of justice which has been effectively attacked by modern developments and theories." I feel that the opposite is nearer the truth, because Austin's command theory of law, although enjoying immediately before the war a belated popularity on the Continent, is no longer accepted by most English or American jurists. For one thing, the attempt to find an Austinian sovereign in federal states such as Australia, Canada, and the United States has proved unavailing, and for another, the legal historians, such as Maine and Maitland, have shown that historically the theory is an impossible one. On the other hand, Austin's insistence on the importance of clear thinking, which can only be attained if legal concepts are precisely analysed, is as important to-day as it was when he first wrote his lectures. Austin never suggested that law was not influenced by ideals of justice—as a utilitarian it would have been logically impossible for him to hold such a view—but he emphasized that we must not confuse the two. The mere declaration of an ideal does not mean that it has been translated into the effective machinery of law. It may be suggested that it is just this failure on the part of Continental legal jurists to distinguish between the "ought" and the "is" which has contributed to the recent breakdown of law. Dr. Friedmann misunderstands the purpose of analytical jurisprudence when, in his only reference to Sir Frederick Pollock's legal philosophy, he says:[11] "A modern English supporter of this aspect of Austin's teaching is Sir Frederick Pollock who dismisses ethical principles—as belonging to the science of legislation—from jurisprudence." Unfortunately Dr. Friedmann merely cites Pollock's *First Book of Jurisprudence* for this statement without giving any page reference so that I have not been able to find it in that book. What Pollock did say in the preface was that he was not intending "to lay out a general system of the philosophy of law," but was only attempting to clarify a number of leading conceptions. Even within this narrow compass Pollock discussed the idea of moral and natural law and the relation between law and justice. To suggest that Pollock did not understand the relation between law and ethics or law and politics is, to say the least, odd, in view of the various subjects to which he contributed important and novel ideas. In his *History of the Science of Politics* which, I believe, is still the best introduction to the subject, he covered part of the same field with which Dr. Friedmann is concerned in the present book, while in his essay on *The Law of Nature*, to which I have referred, he traced the influence of the idea of natural rights on the development of law. In *The History of English Law*, which he wrote jointly with Maitland, there is perhaps the most acute analysis of the mediaeval conception of law to be found in any book on the subject. If to this we add that Pollock wrote the best English book on the philosophy of Spinoza, that he was an authority on Roman and on International Law, and that, as Dr. Friedmann acknowledges, he was the first writer to attempt to put the Law of Tort on

[10] P. 141.
[11] P. 139.

a coherent logical basis, the criticism of "the onesidedness" of his doctrine is hard to understand. Because analytical jurists have insisted that legal science, as is true of all other sciences, depends on the accuracy and precision of its terms, it does not follow that they assume "that thinking about the law can be excluded from the lawyer's province."

Perhaps a greater emphasis on the analysis of the idea of law would have enabled us to escape the evil consequences of the German Freirechtslehre school which Dr. Friedmann discusses in his chapter on *Impact of Modern Social Developments on Legal Thought.* This doctrine, which discards legal logic as a fiction and an illusion, virtually destroys the distinction between law and discretion. No more convenient instrument could have been found for the Nazi purpose, because it enabled them to hide arbitrary rule behind the screen of legality. The more extreme members of the American Realist School similarly regarded law as a myth; as Dr. Friedmann well says[12]: "The philosopher-king of Plato's Republic appears in the cloak of the modern lawyer." It is doubtful whether this school is of sufficient importance to deserve thirteen out of the two hundred and fifty pages devoted to the whole history of legal philosophy, but it cannot be denied that it has had a stimulating influence on American legal thought, even though its practical results have hardly fulfilled its exaggerated promises.

No part of this book is more interesting than Part V, in which the author considers *Modern Political Movements and Their Legal Thought.* We must still wait for a complete statement of the Soviet legal theory, but Dr. Friedmann has succeeded in drawing a clear picture with the material now available to us. The same lucidity is found in his analysis of National Socialist legal thought, although he might have added to the interest of this section by giving us more citations from the original sources.

The second part of this book consists of a number of separate essays in which "the vital significance of legal ideology for the actual working of the law" is demonstrated. Of particular interest is his essay on *English, American and Continental Jurisprudence* which reaches the rather startling conclusion that[13] "in so far as Anglo-American law differs from Continental systems, it is because of a difference in social policy." I doubt whether this is true, for while there is as much difference in social policy between England and the United States as there is between England and France, nevertheless English and American law are substantially the same. The logical growth of the law from certain basic concepts plays a much greater part in the development of the law than we are sometimes prepared to acknowledge: on no other ground can we explain the similarity between the English and American law of torts, which, as a comparison between the American Restatement and Salmond's *Law of Torts* shows, rarely differ on any point of principle. Neither system has adopted any general doctrine of tortious liability, and it is doubtful whether they will do so in the near future, in spite of Lord Atkin's famous dictum in *Donoghue* v. *Stevenson.*[14] Dr. Friedmann says[15] that: "English and American law are at least on the way towards the establishment of a general principle of delictual liability for unlawful interference with a protected interest," but this

[12] P. 194.
[13] P. 317.
[14] [1932] A.C. 562.
[15] P. 291.

begs the whole question as it does not tell us which interferences are lawful and which are unlawful, nor does it tell us which interests are protected and which are not. This vague general principle will not help us in the solution of a single concrete problem.

In discussing the differences between the code law of the Continent and the case law of Anglo-American law, Dr. Friedmann says[16] that "these differences are, however, at the present day, far more apparent than real," but he does not explain why an English or American legal text-book looks so different from one written on the Continent. This difference, I believe, is much more than one of form, for it conditions the approach to most legal problems. The fact that, as Dr. Friedmann points out, both systems move towards a common goal and usually reach the same results ought not to induce us to think that they are substantially the same, just as a traveller by train and a traveller by motor car may have the same goal and achieve the same result although they do so by different methods.

In comparing the Continental and the Anglo-American systems Dr. Friedmann reaches the conclusion that[17] "our discussion reveals a strong movement of Anglo-American legal development towards the Continental technique." I am not certain in what sense the word "technique" is used here, but if it is given its ordinary meaning then the statement seems to me to be a doubtful one in so far as it relates to England. Dr. Friedmann cites the increasing weight of statute law in relation to non-statutory law as evidence of this, but legislation can hardly be described as Continental technique nor is it a recent development in this country. We tend to forget what revolutionary changes were made in the law during the nineteenth century; to take only one example, the Companies Act, 1862, completely transformed the foundations on which the economic structure of this country was based. Nor is administrative law, whatever that vague phrase may mean, either modern or Continental, in spite of the attempt made by some English writers to suggest that this is a foreign importation which is being foisted on the innocent British public. It is, perhaps, unfortunate that the Continental technique has not had greater influence in this branch of the law, for there are some features of the French *droit administratif*, especially in relation to appeals, which might be accepted here with advantage. Nor is it certain that[18] "the teaching of jurists like Stammler, Gény, Kelsen, Duguit, del Vecchio has become widely known, and exercised considerable influence on legal thinking in countries living under the Anglo-American system." Duguit, it is true, did enjoy a temporary popularity and Gény has been frequently quoted, but I doubt whether English legal thinking has been materially influenced by the members of this oddly assorted group.

In his interesting chapter on *Freedom of Trade and English Law*, Dr. Friedmann speaks of[19] "the almost universal refusal of the British judiciary to enter into the economic implications of law, even where it is most closely related to economics." It is difficult to see how this statement can be reconciled with the cases relating to restraint of trade because in *Maxim-Nordenfelt Gun Co.* v. *Nordenfelt*,[20] *A.G. of Australia* v. *Adelaide S.S. Co.*[21]

[16] P. 293.
[17] P. 311.
[18] P. 309.
[19] P.368.
[20] [1894] A.C. 535.
[21] [1913] A.C. 781.

and *English Hop Growers Ltd.* v. *Dering*,[22] the judges, in dealing with this problem of public policy, recognized that they were concerned with the economic implications of the law. They did not, it is true, consult the economists before reaching their conclusions, but they did purport to decide in accordance with the accepted doctrine of the day. If we turn to the much criticized case of *Priestly* v. *Fowler*,[23] we find that Lord Abinger based his decision on the ground that if the employer were held liable for the negligence of one servant to another then an unfair burden would be placed on him. To-day we may feel that the economic and social outlook expressed by Lord Abinger was a mistaken one, but this does not mean that he was not conscious of what he was doing. I know of no period in English legal history in which the judges have taken the view that they were mere automatic interpreters of the law. At certain times they have been more conservative than at others, but conservatism is just as much a philosophy as is radicalism.

The concluding essay on *Legal Values of Modern Democracy* shows Dr. Friedmann at his best. In a few pages he has condensed a remarkable amount of learning, and has clarified ideas which in the case of some other writers take the form merely of vague expressions of emotion. It is to be hoped that he will expand this chapter into a book because it shows how much the lawyer can contribute to political science as a whole.

In the preface to this book Dr. Friedmann says that he hopes that it will "dispel the myth—still lingering—that legal theory is the monopoly of metaphysical and mainly continental philosophers, useless to the pragmatic English or American lawyer. In reality, the Anglo-American contribution to legal thought is varied and powerful." In thus relating English legal philosophy to that of the Continent he has performed a major service, for it has become almost traditional to assume that there is no such thing as English legal philosophy. Perhaps this belief is due to the fact that the problems which have concerned English jurists have, at times, differed from those which were of moment on the Continent. A philosopher, however abstract, is, after all, a human being, and it is only natural that he should concern himself primarily with problems that are of immediate interest. It is therefore hardly surprising that within the past century English legal philosophers have not concerned themselves to any extent with the nature of law, or the relation between law and the State, because the political machinery has been running smoothly. On the other hand in the seventeenth and eighteenth centuries, when these were major questions in England, the contributions of Hobbes, Locke, and Burke (to whom Dr. Friedmann refers, although he is rarely mentioned in less expert books) were of outstanding importance. The English interest in legal philosophy in the nineteenth century was largely centred on the analysis of legal concepts, not as a barren intellectual exercise, but as a means of developing and reforming the law. In this connection it must not be forgotten that Jeremy Bentham, the most successful legal reformer the world has ever known, devoted so much of his time to the study of legal terms. There seems to be no justification for the view, expressed by some critics, that this school has not made a major contribution to legal philosophy. Nor must it be forgotten that Sir Henry Maine made an equal contribution to the study of historical jurisprudence by emphasizing the evolution of legal institutions. In typical English fashion he based many of

[22] [1928] 2 K.B. 174.
[23] (1837), 3 M. and W. 1.

his conclusions on what he had learned during his practical experience in India rather than on the study of law in the books. In more recent days Dicey, Bryce, Markby, Salmond, Maitland, Pollock, and Holdsworth[24] have played their part in developing a living jurisprudence which, although differing both in method and substance from that of the Continent, is of peculiar importance as expressing the genius of the English people.[25] Perhaps this can be best summed up in Maitland's conception of law as a seamless web, that gradual evolution which is true of English life as a whole.

The ordinary student will find this book too difficult and abstruse for his purposes, but it will prove stimulating and of value to the scholar. Not every legal theory has been "reduced to its essential foundations," but, on the whole, Dr. Friedmann has succeeded in presenting an accurate picture of the varying, and frequently conflicting, ideas on which the more important legal philosophies have been based. This is particularly welcome at the present time when the foundations of law, both international and national, must be strengthened if the world is to enter on the era of peace and justice which we all so eagerly desire.

A. L. GOODHART.

A JOB FOR JURISPRUDENCE

To the Editorial Committee, MODERN LAW REVIEW.

DEAR SIRS,

In "Another Job for Jurisprudence," published in your March number, Professor Walter B. Kennedy of New York has done me the honour of a full-length critique of my article, "A Job for Jurisprudence," which appeared in your issue of April, 1944. I trust that I may be permitted a reply, since the subject of law reform is of great importance and since Professor Kennedy has missed my point more widely and at greater length than I should have supposed possible. His desire to prove that I am as mad as a hatter is quite understandable, but he has allowed himself to be led astray by over-keenness. Thus on p. 20 he quotes me, in inverted commas, as saying that the gulf between established legal principles and the social conditions of to-day is "a chasm to be bridged in defiance of logic and legal theory and solved by 'realistic improvisations.'" I should never be one for "solving chasms" and I rather resent this aspersion on my command of language; but my complaint goes deeper than this, since what I actually wrote was: "a gulf which is sometimes to be bridged, in defiance of logic and legal theory, by realistic improvisations, and at other times is not bridged at all." My point—in case there should be any doubt in the minds of Professor Kennedy's readers—was not that the gulf mentioned could always be bridged by a process of

[24] Although Holdsworth was primarily an historian, many of his eassys deal with subjects usually regarded as part of legal philosophy.

[25] In reviewing Dr. Friedmann's book in the *Canadian Bar Review* (1945), 23 C.B.R. 267, Dr. C. A. Wright, K.C., says that "it marks the rebirth of jurisprudential thought in England after many barren years." This seems a strange view for so distinguished a scholar as Dr. Wright to hold. Without in any way denying the value of Dr. Friedmann's interesting work I doubt whether its contribution to original jurisprudential thought is equal to that of the scholars I have mentioned.

improvisation, but that in some cases that was the only way in which it could in fact be bridged; and that it was idle for Professor C. K. Allen to protest that "law is too great and too complicated an instrument for blundering improvisation" so long as jurists like himself and Professor Kennedy take so little interest in current social problems and bring to them, when they are interested, a transcendental conception of jurisprudence which results in no practical proposals.

Professor Kennedy goes on to say that "Mr. Harvey does not make it clear what 'defiance of logic and legal theory' was involved in the 'realist improvisations' that finally solved the legal puzzle emanating from the hire-purchase contracts." Here the Professor is surely shutting his eyes. If he will refer to the sentence preceding the one which he misquoted he will find that it describes the working of the Hire-Purchase Act of 1938 (which I regard as a realistic and successful piece of legislation) in the following terms: "It forcibly inserted a number of express and implied terms into the hire-purchase agreement, whether the parties liked them or not; it made it a criminal offence for the hirer to refuse to tell the owner where the goods were; it deprived the owner of all his contractual remedies against the goods themselves after a certain number of instalments had been paid; and it gave the County Court power to rewrite the contract to suit the pocket of the hirer." I should have thought that this was clear enough, even for a transcendentalist.

But it is when he purports not to quote me but to paraphrase me that the Professor is at his most perverse. Over and over again (viz. on pp. 22, 23, 25, 26 and 30 and twice on p. 27) he says that I am completely antagonistic to the common law and wish to see it fundamentally changed. In fact, I am not in the least concerned to supersede the common law and never said that I was. What I am attacking is not the common law itself but the sort of exaggerated reverence for the common law which is inculcated by the writings of authors like Blackstone and Pollock. That the common law is a great historic institution and that it forms an indispensable background to the statute law which has now so largely displaced it I readily admit, but continued research work on its historical origins (now that the field has been so admirably covered by Maitland, Holmes, Holdsworth and others) appears to me to serve no useful purpose; on the contrary, insofar as it inspires the sort of idolatry which ultimately possessed Sir Frederick Pollock, I consider it positively harmful.

At this point it may be as well to remind Professor Kennedy of what, for the present purposes, the common law consists. First, there is the substantive law of rights and remedies which has already been very largely superseded by statute, but with which I am not concerned. Secondly, there is the adjective law which provides the procedural machinery. This adjective law may further be conveniently divided into the law of evidence and the law of civil procedure. The law of evidence is still based largely on the common law but there has been a steady clamour for its rationalisation for something like twenty years and a considerable advance has been made recently by the Evidence Act of 1938. As to civil procedure, which is what principally concerns me, the whole of the common law on the subject, which was profoundly unsatisfactory, was abolished in the 19th century, at first in a piecemeal fashion and finally *en bloc* by the Judicature Act of 1873. Procedure in County Courts is likewise wholly statutory and now depends on the County Courts Act of 1934. When therefore I criticise the practical working of the civil courts

I am complaining not at all about the common law but solely about the statutory system which has taken its place. As to the personnel of the system the common law again has practically nothing to say. The office of the High Court Judges is governed by the Act of Settlement and that of the County Court Judges by the County Courts Act. Solicitors are the creation of the Act of 1842 and their every activity is regulated by a statutory code of rules. The office of barrister-at-law derives, it must be admitted, from the common law, but on the most important question which concerns us (namely his remuneration) the common law is merely farcical, for in contemplation of law a barrister still does his work for nothing and to this day he is unable to sue for his fees. Professor Kennedy's interpretation of my proposals to alter the rules of civil procedure, or the status of practitioners as an attack on the fundamentals of the common law is therefore a complete misconception—so far, at least, as the English system is concerned.

This misconception has largely coloured Professor Kennedy's comments on my proposals, and the colour has been heightened a good deal by the language in which he chooses to express himself. The late Lord Justice Scrutton (one of the greatest common lawyers of all time) was wont to emphasise the fact that you do not alter the nature of things by calling them names; and the fact that Professor Kennedy feels it necessary to describe my proposed insurance scheme as a "behemoth" supported by a "Gestapo" and involving the "ballooning forth" of an "elephantine" corporation which is bound to be "permeated with governmental inefficiency and bureaucratic bungling" suggests that his observations on the subject are rather a substitute for than the expression of any serious thought. It is possible, however, to discern certain broad ideas through the smoke-screen. Among them is the Professor's dislike of the notion of a nationalised Bar. Although the article to which he is replying contains only two short sentences on this subject and does not discuss it at all, the Professor deals with it at considerable length. I have already set out my views on nationalisation in an earlier article (Mod. L. Rev., Vol. vi, p. 39) and do not propose to repeat them here. But I think it worth remarking that some of Professor Kennedy's criticisms do less than justice to the British civil service. He seems to regard it as axiomatic that anyone who is in government employment is likely to be, or to turn into, a political manoeuvrer or a red-tape-ridden bureaucrat, and he shares that general predilection for private enterprise which is so much stronger in the U.S.A. than in England. In this country the judges are appointed for life and enjoy a colossal prestige. It is they who dominate the proceedings in our courts. In many, if not most, American courts they are elected to their positions and have to run for re-election every few years, and it is probably for this reason that they command less influence over the administration of justice in comparison with the Bar then do their English brethren. It is the opinion of nearly all English lawyers and many Americans that the English system is the better—and this in spite of the fact that our judges enjoy the status of irremovable government employees. In other words, we have progressed much further in the direction of a nationalised administration of justice in this country than they have in America, and certain of the possibilities envisaged by Professor Kennedy with the object of making his readers' hair stand on end will probably seem less horrifying in my country than in his.

For instance, in discussing the question of a nationalised service

Professor Kennedy points out (what he assumes that I have overlooked) that every case that is tried in court involves a great deal of preparatory work out of court, such as interviews with witnesses and examinations of documents, and that this work would also have to be paid for with government money. In a passage which alludes to "an army of government fact-finders" he describes such a state of affairs as a *reductio ad absurdum*; and I suppose that it is I and not he who is intended to look absurd. However, I feel in no way abashed by the picture presented. There is already what I am prepared to describe as an army (if Professor Kennedy finds the metaphor helpful) of people who are doing this sort of work under the present system of private enterprise and who are accordingly paid for by that small section of taxpayers which happens to be using their services at any given time. The proposal shorn of the Professor's verbal virtuosity, is merely that the remuneration of these people should be, spread over the whole body of taxpayers. I claim no novelty for this idea since to a large extent it merely represents the existing practice in continental countries. I am writing away from books of reference, but I think I am right in saying that under the French system, for instance, a vast amount of the preparatory work, in civil as well as in criminal cases, which in countries of the common law is done privately at the expense of the parties is done by the judges and subordinate officials as part of their regular duties at the request of the parties, or even if they do not request it. Whether this is a good arrangement or a bad one may reasonably be argued but, since it is already widely in use, there is nothing to be said for describing it as an *absurdum*.

When he approaches my insurance proposal Professor Kennedy is less lucid. He mistakenly attributes to me a proposal to insure all poor people against all legal liability when in fact I proposed to insure all people, rich or poor, against the costs of litigation only. Arguing from this false premise the Professor concludes that "logic, justice and pragmatic arguments unite to broaden Mr. Harvey's programme" until it is "extended to all litigants and all liabilities of all kinds—civil, criminal and administrative." Such a scheme he considers altogether too big (if I correctly interpret what he says about "a super-Leviathan of gargantuan dimensions.") So do I, and would never have proposed such a thing. All the same, where national insurance schemes are concerned I do not share Professor Kennedy's general sense of misgiving, which evidently derives from his antipathy to State-controlled enterprise in all forms. In this country we have already got far-reaching insurance schemes under governmental control in the fields of health and employment, and they will not run away merely because Professor Kennedy calls them elephants or Leviathans. Moreover, I would remind him that the whole of the litigation which arises out of the use of ships and the major part of that which arises out of the use of motor cars is already insured, in the one case by private arrangement and in the other under national control and in both with good results. Here again I can claim no novelty for my proposals. They are merely an adaptation and extension of what has already been tried with some success in a limited field—which is a very ordinary English way of doing things. As to the financial aspect, which Professor Kennedy finds so horrifying, he would do well to remember that colossal sums are being spent on civil litigation under the present system. I see no reason to suppose that more, and some reasons to suppose that less, would be required to finance either a fully nationalised or a

nationally insured system. The difference would be that the cost would be spread fairly evenly over the community, and it is almost ill-mannered of the Professor to snort as he does at my remark that the difficulty of squeezing money out of the community when it was really wanted has never been found insuperable. For the last five and a half years we in this country have been squeezed to the tune of about 12 million pounds per diem. As one of the squeezees I feel that I know what I am talking about.

But it is idle to expect sympathy from the Professor for any kind of procedural reform. Indeed he thinks it odd that I should even invite academic jurists to interest themselves in these matters. I do so because I feel that they have, or ought to have, time to spare. The philosophic and historical aspects of law have now been exhaustively examined and there is no longer a need for further research in these fields. The new jurisprudence should in my opinion be concerned with translating legal theory into effective action. But Professor Kennedy does not agree. He objects to my outlook on the ground that it "argues for the shaping of legal rules after the events that created the problems." Although this is the way in which all social legislation of any importance (including recent amendments to the American Constitution) has latterly come into being, the Professor dismisses it with the comment that "Law would be pronounced for the day only after the style of a railroad excursion ticket." I have nothing to say about this remark except that I feel glad that it forms part of the works of Kennedy and not of the works of Harvey. But it is clear that the Professor does not intend to exert himself in the furtherance of new ideas. Indeed, he says as much. As the title of his article proclaims, he considers that academic jurists have a job of their own to do which is quite different from the one that I propose for them and which he defines in his last paragraph as taking care "to know where we are going before we launch a new juristic system." Since the Professor does not propose to launch anything he will hardly fall down on this job from overwork.

To one, like myself, who is really interested in the law as a social service it is very saddening to find that, apart from verbal gymnastics, Professor Kennedy has nothing whatever to contribute to schemes for its improvement. Whether he speaks for himself only or for the scholastic lawyers of America in general I have no means of knowing. But I am not happy about it. The administration of civil justice in the U.S.A. is, by all accounts, at least as cumbrous, uncertain and uneconomic as it is in this country, and any evidence that the Professor's academic colleagues are as little impressed as I am by the views which he holds would be gratefully welcomed by

Your respectful servant,

9th May, 1945. C. P. HARVEY.

PARLIAMENT

Select Committee

What's the pother? For some time past many questions and debates have taken up the time of the House of Commons in regard to the conduct of Sir Archibald Sinclair, the former Secretary of State for Air, arising out of what has become known as "The Regent's Park Farm Case."

It has now been admitted that certain irregularities had taken place

at the R.A.F. Training School at Regent's Park, London, and amongst those who were personally involved in the matter was the then Secretary of State for Air. Sir Archibald Sinclair himself made the disclosure to the House, and the House accepted his explanation, that his unfortunate conduct when he purchased parcels of pig food contrary to the food rationing Orders was due to his desire to help R.A.F. Service Charities to whom the proceeds of sale were donated.[1] Certain other irregularities were asserted against certain high ranking officers in the Air Ministry, and most sinister accusations were made from time to time in the House. Whether there was any evidence available in support of the allegations is really not material for the purposes of this inquiry, which is directed to a matter of parliamentary procedure. In fairness to those concerned it should be said that Mr. Churchill stated that he had himself investigated the facts, and he was satisfied that there was no evidence which justified the charges being made. A demand for a Select Committee to investigate the allegations having been made, it was refused by the Government.

It was at this stage that Earl Winterton, M.P., who has assumed the role of "Father of the House" by the then retirement of Earl Lloyd George, asked whether it was not the almost invariable rule, although he admitted there may have been some departures from it, when a charge was made by a member against the personal conduct of a Minister, and when a demand for a Select Committee or some inquiry was made, for the Government to agree to an inquiry.[2] Mr. Churchill replied that he did not think so and that each case must be treated on its merits. I ventured in *The Times*[3] to suggest that there was no precedent that could be cited in support of Earl Winterton's assertions; on the contrary the precedents were against him. I submitted that the Government were under a duty to the House before agreeing to give their support to an inquiry being set up to act as a "Grand Jury" and ascertain whether a prima facie case had been made out for one by considering, first the nature of the charges, secondly all the available evidence, and lastly the bona fides of the members supporting the demand for the inquiry. In this particular instance the bona fides of the members making the request for a Select Committee were not questioned, the only matters that the Government need consider were the nature of the charges and the available evidence. In my submission in the absence of an absolute rule of the Law and Custom of Parliament, if the Government failed to pay regard to these requirements and agreed to a Select Committee being appointed, they would be failing in their duty to the House. Much time and expense might be improperly expended if a Select Committee were constituted unless a prima facie case for one had been first made out, and unless evidence were available on which any reasonable Committee could properly find impropriety in a Minister.

Mr. Falconer who joined issue with me in *The Times* took the point that the contentions which I had ventured to suggest were not the proper basis for consideration before a Government could properly support a demand for a Select Committee being set up because it involved the Government being judges in its own cause. In the absence of an absolute rule, which binds the Government to agree to a Select Committee being set up at the behest of a member, what other criteria should be considered? If,

[1] 404 H.C. Deb. 5S. 478.
[2] 407 H.C. Deb. 5S. 962.
[3] *The Times*, January 27th, 1945.
[4] *The Times*, February 2nd, 1945.

because a charge were made against a member of the Government, the Government were bound to agree on every occasion to a Select Committee being set up every time a member demanded one, the time of the Government and of the members of the House must become diverted to the work of answering charges before Select Committees and it was for this reason that a Government must take into consideration the matters which I have ventured to suggest are relevant. To take an extreme example, must a Government pay serious regard to a member who may be known to be allergic to parliamentary papers so that every time he sees the Order Paper on entering the House he moves for a Select Committee? If Earl Winterton's contentions were well founded the Government would have no option but to support the demand. The refusal of the Government to give support to a demand makes them in a sense, as Mr. Falconer asserts, judges in their own cause. It will be seen hereafter, however, that the decision of the Government is not the final word on the subject, the matter is one which ultimately rests not with the Government but with the House.

A Minister, unlike an Official of the House, can, if he wishes, disregard allegations made against him by members. If allegations, however, were made for example against the Speaker or the Clerk of the House, then I suggest it would be the duty of the Government to move to set up a Select Committee to inquire into them, although the Government may be absolutely satisfied that the charges were not made bona fide, and that there was a complete absence of evidence to support them. Officials of the House who are by reason of their positions unable to defend themselves are entitled to have charges against them investigated without delay.

It is a right, not only of the Official of the House, it is a right of the House, that no impropriety should be attributed to one of its officers.

In 1924, a vote of censure was moved against the Government for improperly interfering in the functions of the Attorney-General when they ordered him to withdraw a prosecution then pending against Mr. Campbell. An amendment was moved to set up a Select Committee of the Commons to inquire into the matter.

The Government resisted the amendment, which was however carried.[5] The next day Mr. Ramsay MacDonald advised the Sovereign to dissolve Parliament and, the Sovereign having accepted the advice of his Prime Minister, the first Socialist Government fell.[6] The precedent of 1924 followed the precedent of 1918, when the Government refused to support a demand for a Select Committee, to investigate allegations made against Ministers of the Crown, arising out of charges made by General Maurice in a letter to *The Times* in connection with the scandal arising out of the shell shortage.[7] These precedents are directly contrary to Earl Winterton's contentions, that, when a request is made for a Select Committee, there is almost an invariable rule for the Government to agree to one being set up.

In 1924, not merely did the House ignore the advice of the MacDonald Government but, in opposition to its wishes, exercised its undoubted right and appointed a Select Committee to investigate the allegations against the Government. This therefore disposes of the assertion made by Mr. Falconer that the Government is the final judge in its own cause if it refuses, after due consideration of all the facts, to a Select Committee

[5] 177 H.C. Deb. 5S. 619; 179 *Commons Journals* 387.
[6] 179 *Commons Journals* 38.
[7] 105 H.C. Deb. 5S. 2347.

being set up to investigate allegations made against a member of the Government.

When the matter was later raised by Earl Winterton in the House, Mr. Churchill replied on behalf of the Government. It is of interest to observe that Earl Winterton cited no precedents in support of his contentions, but rather appeared to adopt the course that the onus of proving what Earl Winterton contended was inaccurate rested with the Prime Minister and that there was no duty on him to prove his contentions.[8]

Mr. Churchill pointed out[9] that if there were an absolute rule that the Government must support a Select Committee being set up every time a member made charges against a member of the Government, then the procedure would bring the whole principle of Select Committees into contempt, and might tend to rob Parliament of an invaluable weapon in its armoury. The Prime Minister said: "The fact is, that the Government remains master of its own conduct, and the House itself, the master of Government, must decide for itself what action to take."

EDWARD F. IWI.

STATUTES

The Income Tax Act, 1945, and the Finance Act, 1945

The passage into law of the Income Tax, 1945, fulfils the promise of the late Chancellor of the Exchequer that he would assist the industrial regeneration of this country by amending the law relating to income tax so that industrial and other concerns would be enabled to charge against their taxable receipts the cost of *capital* expenditure incurred on the installation of new buildings and plant—see note at VII MOD. LAW REV. 222–3. Under the British Income Tax code no allowance can be made in respect of "capital" expenditure since the whole scheme of our taxation looks only to items of a *revenue* nature, whether as regards receipts or payments—see, in general, *Leeming* v. *Jones*, [1930] A.C. 415, and Sect. 209, Income Tax Act, 1918. The Income Tax Act, 1945, marks a sharp break away from the traditional method of computing business profits in that it provides, as regards certain types of assets, that the cost of capital expenditure thereon may be deducted from taxable profits *over a period of years* by means of a complicated system of "initial" and "annual" allowances which are adjusted, when the asset ceases to be employed in the business, by what are termed "Balancing Allowances" and "Balancing Charges"; these latter are intended to meet the deficiency or excess, as the case may be, between the cost of the asset and its realised or realisable value upon cesser, after taking into account all tax deductions already given in respect of its use. For the same reason that both capital profits and capital losses are not regarded as of an income nature in the pure sense of that word, our Income Tax code makes no provision for "exhaustion of capital" in the case of wasting assets, see *Coltness Iron, Co.*, v. *Black*, [1881] 6 App. Cas. 615, and *Alianza Co., Ltd.* v. *Bell*, [1906] A.C. 18; this is in sharp contradistinction to the similar American law which provides for a deduction from gross proceeds *of an amount sufficient*

[8] *The Times* March 12th, 1945.
[9] 408 H.C. Deb. 5S. 2194.

to restore the capital value at the beginning of the basis period—Doyle v. *Mitchell Bros.*, 247 U.S. 179 (1918). The Act, however, contains remedial provisions—by a similar method of "initial," "annual" and "balancing" allowances, etc.—in respect of certain types of wasting assets such as mines, oil wells, foreign concessions and patents.

The Act is divided into eight parts, the first five dealing with the various types of assets in respect of which relief is to be given. It is very lengthy and its provisions are highly technical and involved; the following summary of its provisions will, it is hoped, give some idea of the means by which our industrial concerns are to be encouraged to modernise their plant and buildings so as to equip themselves to meet on an even footing the very efficient and up-to-date industries of the United States. It should, at the outset, be emphasised that the relief given by the Act is operative *only* after "a date to be appointed by Parliament" and that normally it only deals with expenditure etc., incurred *on or after* the "appointed date"; provision, however, is made that all capital expenditure—of the type ranking for allowances—incurred after 5th April, 1944, and before the "appointed date" shall be deemed to have been incurred on such latter date—Sects. 1 (3), 15 (2), 29 (1), 33 (3), and 44.

Part I of the Act deals with allowances in respect of Industrial Buildings and Structures; this term covers buildings, etc., used as mills or factories, for "Public Utilities," for the manufacturing and processing of goods, for working mines, oil wells, etc., and foreign plantations, or those employed in the course of agricultural operations; premises used as retail shops, dwelling houses, hotels or offices are specifically excluded from the scope of the allowances (Sect. 1). An "initial" allowance of one-tenth of the cost of the building is given in the year the expenditure is incurred, provided this is on or after the "appointed day." An "annual" allowance of one-fiftieth of the cost of the building, etc., is granted *regardless*, however, of the date it was erected save that this relief is not applicable to buildings more than fifty years old; the extension of the "annual" allowances to existing buildings seems unjustified since the purpose of the Act is to encourage the provision of modern up-to-date buildings—it is, however, probably linked up with the withdrawal of the existing allowances for "mills or factories": see below. Where an "industrial building" is sold ceases to be used or the interest therein comes to an end, a "balancing allowance or charge" is made (cf. *supra*) by reference to the cost thereof, similar allowances (e.g. "mills and factory" relief and exceptional depreciation) granted prior to the "appointed day" and the amount realised, etc.; these provisions (Sect. 3) do not apply to buildings more than fifty years old. The existing allowance granted by Sect. 15, Finance Act, 1937, in respect of properties used as "mills and factories" ceases as from the "appointed day" subject to an option to the taxpayer to continue it for the four succeeding years (Sect. 7).

Part II of the Act deals with allowances in respect of Plant and Machinery. The existing relief for wear and tear is continued but is to be five-fourths of that considered "just" by the Assessing Commissioners—with a possible extension in the case of mines, etc., and oil wells—while the existing additional allowance granted by Sect. 22 Finance Act, 1938, is repealed (Sect. 16). In order, however, to encourage the installation of new and up-to-date plant and machinery, an "initial" allowance of one-fifth of the cost thereof is granted as regards all such expenditure on or after the "appointed day" (Sect. 15). In computing both the above

allowances, any contributions from the Crown or public bodies towards the cost of the plant, etc., are to be excluded, thereby reversing the effect of the decision in *Corporation of Birmingham* v. *Barnes*, [1935 A.C. 292 (Sect. 16). Similar, and equally involved, provisions as to "Balancing Allowances or Charges" are enacted as were used in the case of Industrial Buildings but no "Charge" is to be made in the case of *ships* lost through enemy action (Sect. 17). The new system is intended to meet the cost of *replacing* existing plant, etc., but, at the taxpayer's option, the scheme can be modified to permit of a reduction of the "Charge" balanced by a restriction of future allowances; as a corollary, the existing allowance for "obsolescence of plant, etc." (Rule 7, Cases I and II, Sch. D, Income Tax Act, 1918) is repealed but may be continued, again at the taxpayer's option, for plant, etc., in use prior to the "appointed day," subject to a proviso that in such case no "Balancing Allowance" shall be made in respect of the old plant (Sect. 18).

Mines, oil wells and mineral deposits are the normal type of "wasting asset" and Part III gives a special form of relief in respect of their user; it covers expenditure on searching, etc., for deposits and on the construction of works likely to be of little or no value when the source is exhausted, but specifically excludes the cost of acquisition of the site or of rights over deposits and of expenditure on plant, processing or welfare buildings and offices (Sect. 25). An "initial" allowance is given of one-tenth of the admissible expenditure incurred on or after the "appointed day" (Sect. 26) and thereafter there is an "annual" allowance of one-twentieth of the residue of the expenditure or, alternatively, of a proportion thereof calculated by reference to the annual output and the sum of the latter and of the *total potential future output* (Sect. 27). In the case of a mine, etc., already working *before* the "appointed day," all expenditure up to that date is deemed to have been incurred thereon and the "annual" allowance is calculated by reference to the potential future output and the aggregate of the actual and estimated output of the source from the beginning to the end of its working (First Schedule). Parliament, perhaps wisely, refrained from giving any guidance as to how the "total potential future output" was to be calculated and left this well-nigh impossible problem of estimation to the wisdom of the Commissioners of Inland Revenue, who are to lay down appropriate rules by way of Statutory Regulations.

The needs of Agriculture are met by the provisions of Part IV, Sect. 33 of which allows the deduction from the profits of the basis and of the nine following years of one-tenth of expenditure on constructing farm houses, cottages, buildings, etc. Rule 8 of No.V, of Schedule A, Income Tax Act, 1918, provides that, where the cost of maintenance, repairs, insurance and management of property exceeds, on the average of the five preceding years, the statutory proportions of annual value already allowed, the owner of the property may claim repayment of tax on the excess; in *Crompton* v. *Campbell*, 1925 Sc. L.T. 23, it was held this repayment could not exceed the tax actually suffered in respect of the *particular* property. Sec. 32 annuls this decision and allows any such excess tax to be claimable against that borne on other "agricultural" income of the year of claim or of succeeding years; alternatively the taxpayer can set the excess against tax on his other income of the particular year (Sect. 56 (1)).

Patents, dealt with in Part V., are another form of "wasting asset," the profits from which have hitherto been taxable in full. Where a person purchases patent rights an "annual allowance" is given, against his

trading profits or income arising from the patent, proportionate to the number of years of user not exceeding seventeen (Sect. 35); where rights are sold or cease, there is a similar system of "Balancing Charges and Allowances." Under the existing law, if profit from sale of patents arises "in the course of business" it is taxable as being of a revenue nature (*Rees-Roturbo Development Syndicate Ltd.*, v. *Ducker*, [1928] A.C. 132) but if the transactions in question represent merely the realisation of assets, then any profit is in the nature of a "capital appreciation" and accordingly without the scope of the Income Tax Acts (*Collins* v. *Firth-Brearley Stainless Steel Syndicate Ltd.*, [1925] 9 Tax Cas. 520). Sect. 37, provides a unique example in the British Income Tax code of direct taxation of capital in that it charges to tax the capital proceeds of the sale of patent rights, by way of assessment in equal proportions over the six years following the sale. To safeguard the interests of the Crown, it is enacted that where a *non-resident* sells rights arising out of a *United Kingdom* patent, Rule 21 of the All Schedules Rules, Income Tax Act, 1918, is to operate, viz., the vendee, on making payment, shall deduct the appropriate tax and account for it to the Crown. Expenses incurred in obtaining, for trade purposes, patent rights are allowable though of a capital nature, as are all expenses incurred by the actual deviser of an invention (Sect. 39). Sect. 41 gives an option to a royalty owner, who receives his royalties under deduction of tax, to have the liability in respect thereof *recomputed* by reference to the period of actual user. The provisions of this part are only applicable to purchases and sales of patent rights, and to expenditure and income arising, on or after the "appointed day."

Sects. 44–45 extend the allowance for "scientific research expenditure," granted by Sect. 29, Finance Act, 1944, to all such expenditure incurred after 31st December, 1936; this is deemed to have been incurred on the "appointed day." Sect. 19 Finance Act, 1941, granted an "Exceptional Depreciation" allowance in respect of buildings, plant, etc., installed after 1937, and likely to be worth less than their cost after the war by reason of conditions arising therefrom; winding-up provisions regarding this allowance are contained in Part VI with special reference to the basis of valuation, the non-repair of buildings and the even spread backwards of the final allowance.

Sects. 58 and 59 are enacted to meet the not unusual type of taxpayer who endeavours to shift his proper burden of taxation by means of "legal evasion." The former section provides that all property, etc., sold in pursuance of *one* bargain shall be deemed to have been sold together, notwithstanding that separate prices had been agreed, or separate sales contracted for, in respect of different items of the property. The latter section is aimed at the case where buildings, plant, etc., are sold and either the buyer or the seller is a "body of persons" which has control over the other party to the transaction or *both* are controlled by another person. Sect. 68 (1) enacts that "control" in relation to a body corporate means the power of a person to secure—by means of shareholding, voting power, articles of association, etc.—*that the affairs of such body are conducted in accordance with the wishes of that person*; this definition of control may usefully be contrasted with that laid down by the Courts as regards the National Defence Contribution and the Excess Profits Tax, viz., possession of a bare majority of those shares of a company which carry votes at a General Meeting: see, respectively, *British-American Tobacco*

Co., Ltd. v. *Inland Revenue*, [1943] A.C. 335, and *Inland Revenue* v. *J. Bibby & Sons, Ltd.* (1945), 1 All E.R. 667.

In striking contrast to the sixty-six pages of the Income Tax Act, 1945, we have the five pages of the Finance Act, 1945, which, with the one exception of an increase of the standard profits for the purposes of the Excess Profits Tax (Sect. 5), merely continues existing reliefs and rates of taxation. This brevity is solely accounted for by the recent dissolution of Parliament and a second Finance Act is promised for the autumn which, among other matters, will implement the recent Anglo-American Conventions for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion as regards income taxes and death duties; see Cmd. 6624–5 of 1945.

A. Farnsworth.

NOTES OF CASES

Interpretation of Wills

In re Palmer: National Provincial Bank v. *Barwill*, [1945] 1 Ch. 8, is the sort of case which confirms the layman in his view that Mr. Bumble was right about the law, and drives lawyers who are anxious about the growing disrespect of the community for our legal system to despair. That it should come from the present liberal Court of Appeal is further proof, if any were needed, that the law relating to the construction of wills has, as a vehicle for ensuring that the intentions of testators are carried out, completely broken down.

Nevertheless, if the Court of Appeal had taken the speeches delivered by the House of Lords in *Perrin* v. *Morgan*, [1943], A.C. 399, to heart, and had approached the problem presented by the case with the object of ensuring that the testator's intentions were given effect to, I do not think they need have been under any real compulsion to give this narrow decision.

By her will, the testator gave the stocks, shares, and moneys which "at her death" should be "standing in her name or at her disposal," and be "in the care, custody or possession of Grindlay's Bank," to her nephews living at her death. After making her will, the testator became of unsound mind, and a receiver was appointed under the Lunacy Act, 1890; and the stocks in question were transferred from the bank into Court, where they were at her death.

No reasonable person could doubt that at the time when she was *compos mentis* the testator intended that, on her death, her nephews should have these stocks and shares. In view of the fact that she might wish from time to time, like a prudent woman, to reinvest or vary the stocks, she, no doubt on the advice of her solicitor, adopted the common method of describing the property in question as that lying in the bank rather than enumerating the individual items. It is not easy to see what more effective choice of words she could have made. Yet since the property had been removed from the bank by an official over whom she had no control, her intentions were disregarded, and her nephews deprived of property which she certainly intended them to have.

The Court of Appeal, I submit, ought to have approached the case with the object of securing the fulfilment of the testator's purpose. In-

stead, just as in the *Morgan* case (to which no reference was anywhere made), when, it will be remembered, the Court of Appeal took a narrow view of "money," they gave effect to the precise meaning of the words "in the care, custody or possession of Grindlay's Bank"; and, indeed, the case went off into an argument as to the effect of the order in lunacy. According to the House of Lords, the words used are to be interpreted with the single object of discovering what was the testator's meaning. Here she was using the phrase in the "possession of Grindlay's Bank" purely as a method of identification, which did not cease to be appropriate, because the property, still readily identifiable as the same, had obtained a new locus. If Grindlays had transferred the property to vaults belonging to Barclays for protection from air-raid purposes, it is inconceivable that the Court would have decided the same way; but the argument would have turned on the technical meaning of the words "care, custody, or possession," and not on what was the real intention of the testator.

It is a purely legalistic argument to contend that since if the testator herself had removed the property from the bank, it would have ceased to be governed by the will, the position must be regarded as exactly the same when the receiver in lunacy removed them for her: yet this was the *ratio decidendi*. If this were really a sound argument, lunacy ought to avoid the will altogether, and the power of testation ought to pass to the receiver himself. Under this decision he is, in effect, empowered to alter a will in so far as it disposes of chattel property or choses in action by location, but not in so far as it disposes of them *nominatim*; surely an illogical and anomalous state of affairs.

R. S. T. C.

Liability for Dangerous Activities carried out by Public Order.

The facts in *Read* v. *Lyons*, [1945] 1 All E.R. 106, are simple. The appellants operated on behalf of the Ministry of Supply a factory for the manufacture of high explosive shells. The respondent who had been directed by the Minister of Labour and National Service to work in the factory as an inspector appointed and paid by the Ministry of Supply was injured by the explosion of a shell. Although the cause of the explosion was not discovered, it was agreed between the parties that there had been no negligence on the part of the appellants. The respondent brought an action for damages against the appellants.

This gives another illustration of the way in which public and private law relationships are being increasingly mingled. The respondent was in no contractual relation to the appellants who operated the factory and owed no legal duty to them. Her duty was towards the government. It entered into the case only in so far as she was lawfully on the premises. The question, however, what her status was in this respect as towards the appellants was not discussed by any of the judgements in the Court of Appeal. Presumably the court thought that, as there was no negligence on the part of the appellants, it did not matter whether the respondent was on the premises as invitee or licensee, since in either case liability would have depended on negligence. It is nevertheless surprising that the matter should have been completely ignored. As has been pointed out elsewhere,[1] the respondent in the present case, like thousands of other members of the increasing army of public servants, belongs to that vast

[1] "Liability to Visitors of Premises," XXI, *Canadian Bar Rev.*, p. 79 *et seq.*

but undefined category of persons entering premises "as of right," that is in the exercise of a public function or duty. The fundamental difficulty in the way of clearly defining this category is the lack of any clear system of administrative law and the need of pressing it into the categories of the common law. As long as this is the case persons entering by virtue of a public function should be put on the highest level of private visitors. In the present case the respondent was "deemed to be" the employee of the appellants for the purpose of the agreement with the Ministry, and that would justify regarding her as a contractee. In that case the occupier must make the premises "as safe for that purpose as reasonable care and skill on the part of anyone can make them" (*Maclenan* v. *Segar*, [1917] 2 K.B. 325). The border line between this category and that of the invitee is far from clear, but it is certain that under either category no liability arises without negligence on the side of the occupier whether it be his own, that of his servant or of his independent contractor.

The main problem before the court was whether the appellants could be held liable—in which case they would have been indemnified by the Ministry—to the respondent because of the exercise of an extra-hazardous activity. This was argued by counsel for the respondent who based himself firstly on the principle formulated in the American Restatement of the Law of Torts and secondly on the principle of *Rylands* v. *Fletcher*. According to the Restatement (s. 519) "one who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm." Ultra-hazardous activity is defined as follows: "An activity is ultra-hazardous if it (*a*) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (*b*) is not a matter of common usage." The rule is however, subject to an important qualification: "The rule stated in s. 519, does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier." Lord Justice Scott who gave a very elaborate judgement, held that, if the Restatement were English law, the appellants would no doubt be exempt from liability as having acted in pursuance of a public duty. He did not, however, think that the Restatement, however much entitled to respect, corresponded to English law. There remained the main question whether a general principle in English law could be found to justify a general liability and damages for dangerous activities. As a result of a searching analysis of the relevant English cases and research, which included an investigation of such authorities as Austin, Holdsworth, Pollock, Salmond and Winfield, the learned Lord Justices arrived at the conclusion that there was no such principle. The general principle, as formulated by Lord Justice Scott, is "that our law of Torts is concerned not with activities but with acts." Neither the rule in *Rylands* v. *Fletcher* nor the principles governing liability for dangerous animals, nor the general classifications and developments of the English Law of Torts justify the contention that the mere exercise of dangerous activity entails a liability for all damage flowing from such activity, regardless of negligence. Strict liability is confined to certain specified cases, of which the most important is the rule in *Rylands* v. *Fletcher*. In other words, the English Law of Torts stops

short of making those who carry out a dangerous activity (such as coal mining or manufacture of explosives) absolute insurers for any damage arising in the course of such activities.

While this conclusion is undoubtedly correct as the law stands at present, it does not perhaps, with all respect, give the whole picture. As the present writer has contended elsewhere,[2] liability for fault and strict liability have moved nearer to each other so that there is now very little effective difference between them. As was remarked in some of the judgements in the present case, liability under *Rylands* v. *Fletcher* is no longer strict except in name. On the other hand, liability in negligence has broadened out in such a way as to become very nearly strict and, in some cases such as in *North-Western Utilities Ltd.* v. *London Guarantee and Accident Company*, [1936] A.C. 108, stricter than the liability under *Rylands* v. *Fletcher*. In most cases of dangerous industrial activities, statutory duties, in the case of which absence of negligence cannot normally be pleaded, and the duties stipulated in *Wilsons and Clyde Coal Co.* v. *English*, make the common law liability of the manufacturer such that the "moral fault" principle of Austin and Pollock becomes a mere shadow, even if it formally survives. The fact that the appellants in the present case acted by order of the Ministry does not affect their position in common law. It is not clear from the report whether the indemnity under their agreement with the Ministry would have covered liability for negligence. Presumably, however, that is the case.

The result then is that the English Law of Torts still stops short of insurance or a general liability for dangerous activity, but that it is moving towards a state in which negligence and so-called strict liability are becoming part of a broader principle. It attaches far-reaching liabilities to those who control industrial premises, structures, land, animals, etc.

In this connection the new principle, adopted in the Government Proposals on Workmen's Compensation must be noted, under which "Workmen's compensation will be treated in future not as part of the law of employer's liability but as a social service" (Cmd. 6551, par. 53). This will largely close the small gap left between the common law liability extended though it now is, and cases where, because of lack of negligence on the part of anyone, no liability exists other than under the proposed Industrial Assurance.

W. FRIEDMANN.

Maintenance Order and Agency of Necessity

The decision of the Court of Appeal in *Sandilands* v. *Carus*, [1945] 1 All E.R. 374; 61 T.L.R. 250, is perhaps more important because of the implied criticism of the present law of maintenance between husband and wife which it contains than because of the actual decision of the point at issue. This is all the more so as the Court added a warning against any undue extension of the ruling given in this case. The plaintiff, a boarding-house keeper, claimed from the defendant, a retired farmer and a man of some means, an amount of £651 as the cost of board, lodging, goods supplied and loans made to the defendant's wife during the years from 1934 to 1940. The plaintiff claimed that all these were necessaries supplied to the wife in respect of which the wife was entitled to pledge the husband's credit. The husband's chief defence consisted in his plea that he had at all

[2] 1 MOD. L. REV., p. 39 *et seq.*

times paid to his wife the sum of 10s. per week in accordance with an order made by a Court of Summary Jurisdiction upon an application by the wife under section 5(*c*) of the Summary Jurisdiction (Married Women) Act, 1895. The plaintiff had taken the defendant's wife into her establishment in full knowledge of these circumstances. The short, but significant point at issue was, therefore: Does the mandate which the common law grants to a wife to pledge the credit of her husband if the latter does not properly provide for her while she lives apart from him because of his misconduct or because she has been turned away by him without sufficient ground (*Boulton* v. *Prentice* (1746), 2 Str. 1214; *Baker* v. *Sampson* (1863), 14 C.B.N.S. 383; *Bazeley* v. *Forder* (1868), L.R. 3 Q.B. 559; *Eastland* v. *Burchell* (1878), Q.B.D. 432) come to an end if an order for maintenance has been made against the husband by the magistrates and the husband has made all the payments in compliance with that order.

The point could not have arisen, if the magistrates had granted to the wife, what is generally called a "separation order" under Sect. 5(*a*) of the Act, for in this case the Act states expressly that such an order shall have the same effect as a decree of judicial separation on the ground of cruelty. Sect. 194 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, provides that, in every case of judicial separation, the husband shall be liable for necessaries supplied to the wife only if alimony has been ordered to be paid and has not been duly paid. In the present case, however, the magistrates had not been asked to grant a separation order under Sect. 5(*a*). They had been asked to grant, and had in fact granted, an order under Sect. 5(*c*) on the ground that the husband had "been guilty . . . of wilful neglect to provide reasonable maintenance" for his wife "having regard to the means both of husband and wife." For this case there is no express provision excluding the common law right to pledge the husband's credit. The question whether the order by a Court of Summary Jurisdiction brought this power to an end is, therefore, not covered by statute. It was also not covered by precedent. The decision in *Wilson* v. *Smyth* ((1831) 1 B. and A. 801), by which Croom-Johnson, J., had considered himself bound, dealt with a case where alimony *pendente lite* had been decreed by an ecclesiastical Court. It had been decided long before the Summary Jurisdiction (Married Women) Act, 1895, had ever been heard or thought of. It was, therefore, clearly distinguishable from the present case and the Court of Appeal had no difficulty in holding that it did not constitute a binding precedent for the present case.

That the plaintiff was not estopped by the decision of the magistrates followed from the fact that she had not been a party to the proceedings before the magistrates. The whole difficulty in the present case arose, therefore, from the fact that the common law right comes into existence only if, in the words of Mr. Justice Lush (in *Eastland* v. *Burchell*, see *supra*, at p. 435), the husband does not make "provision suitable to his means and position" or, in the words of Lord Selborne in *Debenham* v. *Mellon* (1880), 6 App. Cas. 24, if he has not been "properly providing for her." Could it be said that this had been the case here where the husband had made what the magistrates considered a "reasonable" payment "having regard to the means both of the husband and the wife"? Had the Court of Appeal desired to adopt a purely formalistic point of view, it could have confined itself to stating that the decision of the magistrates did not bind the jury (or the Judge performing the functions of a jury) in a common law action.

What seemed reasonable payments to the magistrates need not seem equally reasonable to the jury or the Judge and the latter, not being in any way bound by the decision of the former, could simply disregard the verdict of the magistrates and decide the question, whether the requirements of agency of necessity were complied with, without referring to it in any way. On the other hand it is clearly undesirable that a husband who has complied with a magistrates' order should nevertheless have to expect at any time that his wife might pledge his credit notwithstanding, and in complete disregard of, the order. It would have been easy to argue that the cessation of the common-law right, provided for in case of a separation order, should also take place in the analogous case of an order under Sect. 5(*c*). Had this been one of the usual cases of small men and had the payments ordered by the magistrates been less inadequate than here, this would in all probability have happened. In the present case, however, the defendant was a man of means. It is a trite saying that the domestic courts of the magistrates are not capable of dealing with cases of this character and in the present case the magistrates demonstrated their inability especially clearly by awarding to the wife a weekly sum of no more than 10s. In this situation it would have been very hard indeed to refuse her the right to exercise her common-law power merely on the ground of her receiving this paltry weekly payment. On the other hand the Court of Appeal obviously felt the necessity of proving that to hold that a wife is not "properly provided" although she is in receipt of "reasonable payments," does not mean introducing an obvious inconsistency into the law. It is this part of the judgment which is of particular interest, because it evidences convincingly the unsatisfactory character of the present law of maintenance between husband and wife.

The Court tried in the first instance to stress that the case of a maintenance order is different from that of a separation order so that the grounds which justified in the latter case a cessation of the common-law right did not of necessity also apply in the former. It is obvious that the Court felt not wholly satisfied with the argument *e contrario* drawn from the omission on the part of the legislator to mention the case of a maintenance order and that the Court thought it necessary to strengthen this somewhat old-fashioned and formalistic argument by showing that it was teleologically right to make a distinction between the two cases. According to the Court of Appeal the justification for this distinction lies in the fact that in the case of a maintenance order the magistrates need do no more than make provision for the wife in a manner which is of a purely temporary character. *Ex hypothesi* the wife is willing to resume cohabitation notwithstanding the misconduct committed by the other party. In view of this willingness on her part (which, of course, does not exist in those cases where a separation order has been applied for) and in view of the magistrates' power of reviewing, at any time, upon application. their decision, the order need do no more than satisfy the wife's "immediate and most pressing needs." Thus it is not to be taken for granted that a wife who receives the payments as ordered is "properly provided" for in the sense of the common-law.

This argument seems hardly convincing. The magistrates have a power of reviewing their decision upon application in both cases—in this respect there is no difference between a separation order and a maintenance order. It follows that the existence of that power should not have been used as an argument in the present connection. That the wife is willing to

resume cohabitation is in no way an indication justifying the hope that cohabitation will soon be resumed. The magistrates would be able to confine themselves to providing for the most immediate and pressing needs if they had any ground to assume that cohabitation would soon be resumed: but the fact that one side is willing to resume it, is hardly sufficient evidence justifying such an optimistic attitude. In the present case notwithstanding the wife's willingness to resume cohabitation the order was in force for six years. It came to an end only as a result of the wife being granted a divorce from the defendant. Few magistrates will feel inclined to follow the implied suggestion of the Court of Appeal to award lesser maintenance payments to wives who are willing to forgive than to those who desire separation.

On the other hand arguments which apply likewise to separation and to maintenance orders are necessarily exposed to the objection that they were rejected by Parliament when the latter provided for the cessation of the common-law right in the case of separation orders. For this reason it is no answer to the defendant's plea to argue, with the Court of Appeal, that small weekly maintenance payments can never satisfy sudden and unforeseen needs of the wife which may, of course, always arise, or that it is not an answer to the common-law right that the defendant has no means to pay, provided that the goods or services for which payment is demanded are really "necessaries." The Court of Appeal says rightly that the magistrates will often be inclined to order a weekly payment that is rather smaller than the wife's needs require, because on failure to pay the husband may be imprisoned without further evidence that he has the means to make the payment (*Rex* v. *Richardson*, [1909] 2 K.B. 851). But this consideration too applies to separation orders as well as to maintenance orders and for this reason proves more than it should do to be useful in support of the Court's thesis.

At the end of its judgment the Court pointed out that this was a case which differed insofar from the vast majority of all cases as in most cases the sums awarded by the magistrates would be sufficient to provide properly for the wife. The procedure before the magistrates' court had been devised to place a speedy remedy at the disposal of people of small means. In such cases the small sums which the courts had power to award would be sufficient. The present case in which the defendant was a man of substantial means was exceptional As a rule credit could, therefore, not be given to a wife in whose favour a maintenance order had been made.

It is difficult to read the judgment in this case without becoming once more deeply conscious of the shortcomings of our present law of maintenance as between husband and wife. To some of these shortcomings the Court of Appeal has itself drawn attention. The archaic form of enforcement of maintenance orders—in the present state of our law of execution unfortunately perhaps the only efficient form—is as the Court of Appeal rightly points out not only in itself regrettable. It also has a mischievous influence on the administration of the substantive law. The limitation of the sum which the magistrates can award makes it impossible for the middle and upper classes of the population to use the remedies provided for by the Summary Jurisdiction (Married Women) Act. Yet no remedy is provided for those belonging to those classes. On the other hand the remedy that is provided is not a very good one. It may satisfy a very rough average. But it is too inflexible to do justice to the countless variations of circumstances with which the courts have in actual practice

to deal. The solution adopted by the Court of Appeal in the present case was probably the only equitable solution of the case under consideration. But "hard cases make bad law." The present law imposes upon the creditor the burden not only of asking whether what the wife buys is a "necessity," but also of investigating whether there has been a maintenance order by the magistrates and of further ascertaining whether payments under this order have been properly made and, if so, of finally considering whether the amount fixed by the magistrates constitutes "proper provision" for the wife. Can it be said that this is good law?

The wife's power of acting as agent of necessity for her husband would offer a most attractive topic for a study in, what *Bentham* has called, deontological jurisprudence. Those who are interested in the contribution which comparative law could make towards the solution of such problems may be referred to the two South African cases of *Reloomel* v. *Ramsay* (1920), T.P.D. 371 and *Frame* v. *Boyce & Co.* (1925), T.P.D. 353. These two cases go a long way to prove that it is possible to find a much more rational solution that the one which now forms part of English law.

E. J. Cohn.

Investment—Its Nature for Taxation Purposes

Income derived from "investments" is specifically excluded from the computation of business profits liable to the Excess Profits Tax, save in the case of businesses carried on by banks, assurance concerns, building societies and what are commonly known as "investment" companies—Rule 6 (1), Part I Seventh Schedule, Finance (No. 2) Act, 1939; the rule, however, does not define the term "investment." In *Commissioners of Inland Revenue* v. *Rolls-Royce, Ltd.* (1944), 2 All E.R. 340, the issue was, briefly, whether patents, registered in the respondent-company's name, which covered inventions made by its own employees were comprehended by the word "investment"; if so, the royalties accruing from those patents would be without the scope of the Excess Profits Tax.

In *Commissioners of Inland Revenue* v. *Gas Lighting Improvement Co., Ltd.*, [1923] A.C. 723, the Courts were squarely faced with the task of defining the term "investment" as used in identical provisions relating to the Excess Profits Duty imposed by the Finance (No. 2) Act, 1915. It was there held that the expression "investment" was not a word of art but fell to be construed according to its ordinary and business meaning and was not to be confined to securities wholly disconnected with the business carried on by the taxpayer. Such a meaning was well expressed by the dictionary definitions of "investment" cf. O.E.D., "*conversion of money* into some species of property from which income is expected" and Webster, "*the laying-out of money* in purchase of some species of property." Since the particular patents in the *Rolls-Royce* case had been acquired neither by purchase nor by the "laying out of money" but had resulted from inventions of the company's own research workers, they could not be regarded as "investments" in the ordinary or business sense of that term.

The earlier case of *Commissioners of Inland Revenue* v. *Rolls-Royce Ltd.*, [1942] 1 All E.R. 196—which had held that royalties from the *very* patents in issue in the later case were not chargeable to the National Defence Contribution imposed by the Finance Act, 1937—was distinguished on the ground that the income excluded from that tax by a similar rule (Rule 7 of the Fourth Schedule of the Act) was income arising from "investments

or other property," and it had been held in *Commissioners of Inland Revenue* v. *Sangster*, [1920] 1 K.B. 587, that patents were a species of property.

On the question of construction, it may be noted that, in *Rvall* v. *The Du Bois Co., Ltd.*, [1933] 150 L.T. 386, it had been held that the words "stocks and shares" in Rule 1 of Case V, Schedule D, Income Tax Act, 1918 -which charges income arising from "possessions" abroad could not be construed according to their ordinary and natural meaning in English law since they were clearly appropriate only to companies outside the United Kingdom and incorporated under foreign law.

A. FARNSWORTH.

REVIEWS

ERRATUM

In the review of *National Health Insurance*, by Hermann Levy, published in Vol. VIII, p. 171, it was stated that this work was published by the Oxford University Press. In fact, this was published by the Cambridge University Press. We apologize for this error.

BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1944, Oxford University Press. Price **25s.** net.

The resumption of the publication of this highly authoratitive Year Book, after five years of war, is amply justified by the excellence of its contents. The editor, Professor Lauterpacht, has attempted to preserve continuity by notes on the most important decisions of English courts involving points of public or private international law from 1939 to 1942. This is supplemented by a review of English court decisions relating to trading with the enemy in the years 1939 to 1943. The review section, too, covers the more important publications on international law during the war.

The issue contains several articles of outstanding importance. Professor Gutteridge leads off by an article on comparative law and the law of nations, which takes a rather sceptical view of the extent to which principles of private law can be utilised in the progress and interpretation of public international law. He regards the main function of comparative law as serving as a corrective to any tendency to employ rules which belong exclusively to one or a few systems as if they were universal rules. Dr. Mann contributes an important article on the law governing state contracts which investigates the important group of inter-state transactions which are neither clearly political principles nor commercial contracts. In the light of a careful analysis of the major international transactions in this field, the learned author classifies certain standard types of agreements and suggests that the intention of the parties primarily determines the application of private law to public international law. This intention has to be ascertained according to methods similar to those determining the "proper law" of a contract. Professor Lauterpacht contributes a weighty article on the law of nations and punishment of war crimes which, if anything, gains in interest by the fact that it was written before the end of the war and the principles now adopted for the war trials. Some of the recommendations and warnings of the learned author have unfortunately not been adopted. The court for the major criminals is inter-Allied but not an international court, and the principles

adopted for the prosecution certainly go, for good or evil, far beyond the accepted principles of international law. The article is also notable for the possibly belated admission that many of the rules of warfare have ceased to be effective, and that reprisals are not a commendable argument to cover breaches or changes of international law. Other articles are by Mr. Beckett, who analyses to what extent the principal aspects of consular immunity can be regarded as generally recognised rules of international law, and by Dr. Colombos who investigates the matters ripe for unification of maritime international law in time of peace. Professor Brierly's article on vital interests and the law, is a chapter from his recent book on the outlook for international law.

This volume unquestionably re-establishes the high reputation long enjoyed by the *British Year Book of International Law*.

W. FRIEDMANN.

BOWSTEAD ON AGENCY: tenth edition by JUDGE A. H. FORBES, pp. xc and 336 (with index). London: 1944, Sweet & Maxwell, Ltd. **35s.** net.

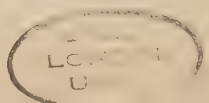
There was a fashion at the time this book was written (first edition, 1896) to produce textbooks in the form of digests with illustrations from the cases, and occasional explanatory notes. The late Lord Justice Scrutton's work on Charterparties and Bills of Lading was perhaps the most noteworthy product of this period, but the late Mr. Bowstead's "Agency" followed not far behind.

Its popularity with practitioners, for whom as the present editor points out, it has always been intended, is attested by the numerous new editions which have appeared at fairly short intervals. There is, of course, no other competent textbook. Moreover, the digest method, especially when supported by the profuseness of illustration of this book, is particularly convenient to practitioners. Bowstead is therefore indispensable at present and would probably hold its own against a better work produced in more conventional form.

Mr. Bowstead was not an outstanding exponent of the art of writing digests. His style was prolix, lacking the succinct phrasing of Lord Justice Scrutton. He was also deficient in the sureness of touch which marks the great digester. He often did not distinguish between major principles and rules on the one hand, and derivative subprinciples and subordinate rules on the other. His work was, however, characterised by a comprehensive grasp of the subject, and a competent lucidity in statement: essential qualities in a book of this kind. On the whole it undoubtedly deserves its wide popularity.

The principles of Agency are now well understood, and the number of cases reported during recent years is inconsiderable. A significant proportion of those during the war have been concerned with the responsibility of a principal for the criminal acts of his agents, largely in connection with infraction of Defence and other regulations. Judge Forbes has added a section on this topic, and has noted up all other recent and some older relevant cases in the thorough manner which all who know him would expect.

R.S.T.C.



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